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# FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

# FEDERAL COMMUNICATIONS COMMISSION

Reed E. Hundt, Chairman
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# Federal Communications Commission Record

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 94-89**

In the Matter of

Elehue Kawika Freemon and Lucille K. Freemon, Complainants, File No. E-90-393

v.

American Telephone and Telegraph Company, Defendant.

**Appearances**

*Elehue K. Freemon, Pro Se;* and *Mark C. Rosenblum, Peter H. Jacoby,* and *Clifford K. Williams,* on behalf of AT&T.

**DECISION**

**Adopted: July 21, 1995; Released: August 8, 1995**

By the Review Board: MARINO (Chairman) and GREENE.

Board Member GREENE:

1. The Review Board has before it for consideration a pleading styled "Motion for Appeal," filed March 24, 1995, by Elehue Kawika Freemon, which is in the nature of exceptions to the *Initial Decision,* 10 FCC Rcd 2157 (1995), (*I.D.*) of Administrative Law Judge Walter C. Miller (ALJ), which dismissed the above-captioned Section 208 complaint for monetary damages from AT&T Corp. (AT&T).[1] AT&T also filed limited exceptions, a reply, and a request for oral argument. We will deny AT&T's request for oral argument because it does not appear that oral argument would lend valuable assistance in resolving the issues before us. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases,* 6 FCC Rcd 157, 163 ¶ 46 (1990). We adopt the ALJ's findings of fact, affirm his dismissal of that portion of the complaint attributable to Lucille Freemon, and deny Elehue Freemon's complaint for failure of proof.

2. The crux of Freemon's complaint is an allegation that an AT&T operator handling Elehue Freemon's collect telephone call to his mother, Lucille K. Freemon, on May 30, 1988, violated Section 705 of the Communications Act of 1934, as amended, 47 U.S.C. § 605, by listening in on their eight-minute conversation, interrupting to ask Mrs. Freemon whether her son needed medical help, and divulging the contents of his call by forwarding it to the local emergency services agency and advising them that an emergency may exist with the caller. *See Hearing Designation Order,* 9 FCC Rcd 4032 (1994) (*HDO*). Section 705 (a) provides in pertinent part:

> Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof. . . .

The chapter 119 exception noted above permits a switchboard operator "to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service ...." 18 U.S.C. § 2511 (2)(a)(i). The instant proceeding also seeks to determine whether the Freemons suffered any measurable harm as a consequence of a violation of Section 705 and are entitled to an award for damages under Section 207. *HDO,* 9 FCC Rcd at 4032 ¶ 1.

3. The issues specified are:

> 1. To determine the facts and circumstances surrounding AT&T's handling of Elehue Freemon's operator-assisted telephone call to his mother, Lucille Freemon, on May 30, 1988.
>
> 2. To determine whether a telephone conversation ensued between Elehue Freemon and Lucille Freemon on May 30, 1988, at the time an AT&T operator handled the operator-assisted call at issue.
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> 3. To determine whether AT&T, through its operator or otherwise, intercepted and disclosed the contents or meaning of any telephone conversation that may have taken place between Elehue Freemon and Lucille Freemon on May 30, 1988, within the meaning of Section 705 of the Communications Act.
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> 4. To determine, in light of the evidence adduced under issues 1 through 3 above, whether AT&T's actions in handling Elehue Freemon's May 30, 1988 operator-assisted call violated Section 705 of the Communications Act.

[1] The caption of the *Hearing Designation Order* lists American Telephone and Telegraph Company as the defendant. Following the filing of the complaint, the defendant changed its name to AT&T Corp. The term AT&T herein means AT&T Corp. and its predecessor American Telephone and Telegraph Company. *See* Appendix A item B (Definitions) of Defendants First Request for Production of Documents by Complainant Lucille K. Freemon, filed September 9, 1994 by AT&T.

Section 208 of the Communications Act, 47 USC § 208, provides that a complaint may be filed with the Commission alleging any violation of the Act by a common carrier, and Section 207, 47 USC § 207, permits a recovery for damages to be included in that complaint.

5. To determine, in view of the evidence adduced on the foregoing issues, whether and if so, in what amounts, AT&T should be required to pay monetary damages to complainants.

6. To determine, in view of the evidence adduced on the foregoing issues, whether complainants are entitled to an award of prejudgment interest on any damages recovered in this proceeding.

*Id.* at 4034. Both the burden of proof and the burden of proceeding with the introduction of evidence were placed on the complainants. *Id.*

4. Initially, the ALJ dismissed all portions of the complaint attributable to Mrs. Freemon. *I.D.* at ¶ 12.[2] Her Notice of Appearance, the filing of which was a prerequisite under 47 CFR § 1.221 to her right to be heard, was concededly signed and filed by Mr. Freemon rather than Mrs. Freemon (Tr. 4);[3] and she subsequently testified, by deposition, that her son was prosecuting the action alone. Judge's Exh. 1 at 33-34. She also indicated at that time that she thought her son's dispute with the telephone company was over, *id.* at 35-36, 54-55; and when asked by the ALJ at the prehearing conference held November 10, 1994, as to whether Mrs. Freemon was still a complainant, Mr. Freemon replied: "As far as I know, at this stage she is not." Tr. 12. Mr. Freemon's Appeal further corroborates that Mrs. Freemon is not a present complainant in the case. Br. at pp. 12-13 ¶ ¶ 82-83. These circumstances considered, the ALJ's ruling dismissing all portions of the complaint attributable to Mrs. Freemon as a complainant herein is affirmed.

5. The ALJ also dismissed the remainder of the complaint concluding that Mr. Freemon had filed a "sham suit against AT&T" which "should not be given serious consideration." *I.D.* at ¶ ¶ 11, 17. The basis for this holding was the ALJ's finding that Freemon had dishonestly included his mother as a co-complainant to enhance his chances for securing a large cash award from AT&T and then, when it subsequently appeared that she was a litigation liability rather than an asset, came up with the idea that she had Alzheimer's disease to discredit her testimony. *Id.* at ¶ ¶ 17-22. Alternatively, the ALJ held that, assuming, *arguendo,* the complaint was not a sham, it would have to be denied because Freemon, who had burdens of both proceeding and proof, fell significantly short of meeting those burdens since three of Freemon's tendered exhibits were rejected; and, even if they had been admitted, they would not have established a nexus between the alleged injury and the monetary claims against AT&T. *Id.* at ¶ ¶ 24, 26; Tr. 114. Finally, although observing that findings of fact or law are superfluous in light of the above determinations, the ALJ, nonetheless, made such findings on the designated issues, citing as cause the protracted length of time the matter has been pending and AT&T's position that the matter should be decided on the merits. *I.D.* at ¶ ¶ 27-28. The ALJ's pertinent findings and conclusions follow.

6. On May 30, 1988, at approximately 10:30 p.m., Mr. Freemon attempted to place a long distance collect call from his home in Gresham, Oregon, to his mother in Long Beach, California. *Id.* at ¶ 29. Prior to placing the call, Mr. Freemon had drunk at least three glasses of wine and had ingested an indeterminate number of sleeping pills. *Id.* According to the long distance operator, Nancy Zolnikov, Mr. Freemon was breathing heavily, his speech was confused and disoriented, and he was experiencing difficulty in identifying the party he desired to reach, stating to the operator he wanted to speak with "Mom." *Id.* at ¶ ¶ 30-31. After reaching Mrs. Freemon and announcing that Mr. Freemon was trying to place a collect call, Ms. Zolnikov advised Mrs. Freemon that her son appeared to need medical assistance. *Id.* at ¶ 32. Mrs. Freemon gave the operator Mr. Freemon's full name and authorized Ms. Zolnikov to seek medical assistance for her son. *Id.* Ms. Zolnikov routed the call to the Oregon Emergency Services in Portland, Oregon, which independently determined to send the police to Mr. Freemon's residence. *Id.* at ¶ 33. The ALJ concluded that Ms. Zolnikov's judgment had been accurate and that a medical emergency did exist because Mr. Freemon was contemplating suicide. *Id.* at ¶ 40. Mr. Freemon was thereafter involuntarily hospitalized in a Police Officer Mental Hold for his own safety for four days following the purported suicide attempt.

7. Based on his findings, the ALJ held that: (a) no conversation had ensued between Elehue Freemon and his mother at the time the AT&T operator handled the operator-assisted call; (b) there was no interception or improper divulgence by the AT&T operator, Nancy Zolnikov; (c) Zolnikov did not violate Section 705 of the Communications Act, and forwarded the call to emergency agency as a necessary incident to the rendition of AT&T's service; and (d) the complainants are not entitled to damages or any prejudgment interest. *Id.* at ¶ ¶ 34-42. He added that even if AT&T had violated Section 705, the complainants could not prevail because they did not meet their burdens of proceeding or proof, or even seriously attempt to address those burdens. *Id.* at ¶ 41.

8. In its limited exceptions, AT&T supports the findings and conclusions of the *I.D.*, but contends that the *I.D.* should have dismissed the complaint because Section 705 of the Act is not applicable to wireline calls; and, furthermore, the claim was untimely and thus barred by Section 415 of the Communications Act prescribing the statute of limitations. Additionally, it argues that the conduct complained of is contrary to AT&T corporate policies and therefore cannot serve as a basis for liability against the corporation. We need not reach these exceptions. First, the Board has no authority to dismiss an *HDO* issued by the Commission or under delegated authority as defective on its face. *See Frank H. Yemm,* 39 RR 2d 1657, 1659 ¶ ¶ 3, 6-7 (1977). Second, the exceptions concerning the propriety of the *HDO* are not decisional since we are denying Freemon's complaint for failure of proof. It is also unnecessary to decide whether the conduct complained of is contrary to AT&T's corporate policies, for the record is void of any evidence of wrongdoing by operator Nancy Zolnikov.

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[2] The complaint includes an affidavit ostensibly signed by Mrs. Freemon in which she alleges that she told the operator she "did not want the police" at her son's residence. Freemon Exh. 1 at p. 12-13. The ALJ found, however, that the allegations contained in the affidavit were actually Elehue Freemon's rather than his mother's and that she did not bring or ever intend to bring a complaint against AT&T. *I.D.* at ¶ 12 & n.9.

[3] The ALJ found that Freemon had forged his mother's Notice of Appearance. *I.D.* at ¶ 13.

9. In the appeal, Freemon charges initially that the ALJ was biased in dismissing the complaint, that the ALJ intended "to railroad this case into a dismissal by systematically discrediting the complainants by whatever means at his disposal," and that he should have recused himself from the case. Br. at pp. 4-7 ¶ ¶ 26, 30-41, 9 ¶ 59, 15 ¶ 96, 19 ¶ 153. Freemon further contends that the ALJ erred: (a) by failing to demonstrate a "heightened duty" to Freemon because of Freemon's prosecution of the case without assistance of legal counsel, *id.* at p. 11 ¶ 70; (b) by not accepting Mrs. Freemon's medical reports into evidence, *id.; see also* pp. 4-5 ¶ 27; (c) by rejecting from evidence Freemon Exh. 2, which includes, *inter alia*, a copy of the 911 telephone transcript of the May 30 emergency call released by the Portland, Oregon Bureau of Emergency Communications, *id.* at pp. 5 ¶ 28, 13 ¶ 87; and (d) by rejecting Freemon's own hospital records from evidence. *Id.* at pp. 9-11 ¶ ¶ 61-62, 67-68.

10. Freemon argues that a "heightened duty" and acceptance of his mother's medical reports would have avoided the ALJ's adverse character findings that Freemon dishonestly included his mother as a co-complainant, knowing she had no intention to become a party, and raised her mental disability only because he became aware she was a litigation liability rather than an asset. *Id.* at pp. 11-12 ¶ ¶ 71, 77. Additionally, he asserts that his mother's reports would have demonstrated that she has had Alzheimer's over a period of years, which taints the credibility of her deposition. *Id.* at p. 9 ¶ 53. Freemon also argues that the 911 telephone transcript demonstrates that he and his mother conversed after the operator announced to his mother that he was trying to place a collect call. *Id.* at pp. 16-18 ¶. ¶ 113, 146-147. Finally, Freemon claims that his hospital records would have shown that he had no drugs in his system and that he had not been in immediate danger when transported to the hospital the night of the call. *Id.* at pp. 10-11 ¶ ¶ 62, 64, 68.

11. Initially, we will strike Freemon's exceptions alleging bias. We have recently had occasion to remark:

> [w]here an applicant [or in this case, a complainant] fails to utilize the specified procedures provided by the Commission in Section 1.245 of its Rules, 47 CFR § 1.245, governing disqualification of a presiding ALJ, but nonetheless raises the matter of bias in its brief and exceptions for the first time, the Board's general practice is to strike those exceptions that seek through the back door to cast serious aspersions on the integrity of the presiding ALJ with undocumented maledictions in a forum in which the ALJ cannot respond.' *Aspen FM, Inc.*, 5 FCC 3196 at ¶ 4 (Rev. Bd. 1990).

*Maria M. Ochoa*, 10 FCC Rcd 4323, 4324 ¶ 9 (Rev. Bd. 1995). In *Ochoa*, as here, we struck the exceptions alleging bias. As requested by Freemon, however, *see* Br. at pp. 19 ¶ 153, 21 ¶ 163, we have reviewed the record with special care and due deliberation. *See Ochoa*, at ¶ 9 and cases cited therein.[4]

12. Freemon's remaining exceptions are without merit and provide no basis for overturning the *I.D.* First, although Freemon is correct that a *pro se* complaint, however inartfully pleaded, must be examined to ascertain "whether any possibility exists that the [complainant] could prove a set of facts in support of his claim that would entitle him to relief," *Martin-Trigona v. Smith*, 712 F. 2d 1421, 1424 (D.C. Cir. 1983); *see also Mandeville Broadcasting Corp.*, 2 FCC Rcd 2523 (1987) ("rambling and confused pleadings of litigious *pro se* parties are entitled to patient and reasoned analysis and decision"), a review of the evidentiary record and proffered materials establishes that the ALJ was conscientious in compiling the best available evidentiary record and that he examined all of the material proffered by Freemon to ascertain whether a claim entitled to relief had been presented. The ALJ even took the extraordinary step of admitting into evidence as "Judge's Exhibits" the depositions of all of the major principals involved in the disputed events including Mr. Freemon, Mrs. Freemon, and Ms. Zolnikov. *See* Tr. 156, 173-74; *Order*, FCC 94M-641, released December 13, 1994. He also attempted in his *Prehearing Order*, FCC 94M-482 (corrected), released August 19, 1994, to assist the parties in identifying the specific evidentiary items necessary to resolve the complaint. He advised Freemon from the outset on the need to retain a trial attorney rather than to represent himself. *Prehearing Order, supra; Memorandum Opinion and Order*, FCC 94M-550, released September 28, 1994. And, he retained Freemon's rejected written exhibits in the record as an offer of proof. Tr. 174.

13. Second, the ALJ did not abuse his discretion in rejecting Mrs. Freemon's medical reports. A presiding ALJ has "broad authority to regulate the course of the hearing, particularly with respect to ... evidentiary matters." *Metroplex Communications, Inc.*, 2 FCC Rcd 4513 (Rev. Bd. 1987). The reports, which are now attached to Freemon's Appeal as "Exhibit 4," consist of correspondence in 1991 between physicians relating to an initial consultation with Mrs. Freemon concerning memory loss, and an additional letter dated November 23, 1994, from a physician stating that he is treating Mrs. Freemon for hypertension and Alzheimer's and that she is disabled from going to Washington for a court appearance. They were not part of Freemon's direct affirmative case, which the ALJ ordered to be exchanged on November 10. *See Prehearing Order, supra*, at ¶ ¶ 14-18. Rather, they were first proffered to the ALJ and opposing AT&T counsel at the hearing on December 12, 1994. *See* Tr. 322-341. Freemon acknowledged

[4] In connection with the bias charge, Freemon appended to his Appeal four exhibits, each of which is, for the main part, a statement of a family member or friend under a heading labelled "Request for Participation," that attempts to address the remark made by the ALJ that Mr. Freemon's complaint is a "sham." *See I.D.* at ¶ 17. The requests were purportedly filed pursuant to Section 1.225 (a) of the Commission's Rules, 47 CFR § 1.225 (a). The same exhibits were refiled separately from the Appeal at other dates. Section 1.225 (c), however, provides that "When a hearing is held, no communication will be considered in determining the merits of any matter unless it has been received into evidence." None of the statements or other material accompanying the Requests for Participation was proffered or received into evidence. In any event, "recusal [of an ALJ] is required only where a 'disinterested observer may conclude that the [decisionmaker] has in some measure adjudged the facts as well as law of the particular case in advance of hearing it.'" *Metropolitan Council of NAACP Branches v. FCC*, 46 F. 3d 1154, 1164-1165 (D.C. Cir. 1995).

he did not prepare the exhibit until there was a prospect that his mother might have to testify at hearing. Tr. 326-327. Mrs. Freemon had previously been deposed and given deposition testimony that conflicted with Mr. Freemon's version of the facts. The ALJ acted well within his discretion in rejecting the medical reports on the grounds they were too late and appeared to have been compiled by Freemon after the date for submission of direct cases. Tr. 337.

14. In any event, there is no record support to demonstrate that a "heightened duty" by the ALJ or acceptance of Mrs. Freemon's medical reports would have negated the ALJ's adverse findings regarding Mr. Freemon's character or tainted Mrs. Freemon's deposition. The ALJ enumerated questionable actions by Freemon to support his findings. *See* para. 5, *supra*, and nn.2-3. But whether we would draw the same inferences is not decisional since our affirmance of the *I.D.* rests on Mr. Freemon's failure of proof. *See* para. 21, *infra*. And as to the deposition, Freemon has not shown how the medical correspondence would have tainted Mrs. Freemon's credibility. Even allowing that Mrs. Freemon has suffered a significant degree of memory impairment, her deposition nevertheless appears to reflect that she possessed some memory of the incident and the trauma it caused her son, consistent with the other evidence discussed below. For example, when show a copy of the complaint, she responded:

> A. I was wondering, I thought all of these things were over. My goodness, I can't believe this.
>
> * * *
>
> A. Gosh, he has never gotten over it.

Judge's Exh. 1 at 54-55. When asked to read the factual allegations in the complaint, she responded:

> Q. And you don't remember it occurring that way?
>
> A. No. No. This is terrible.
>
> * * *
>
> A. What's written on here is not the truth.
>
> * * *
>
> Q. Right. Did it happen a different way, Mrs. Freemon? Do you remember getting a call from an operator who indicated that your son might be in trouble and then asked you for information about how to help him? Mrs. Freemon?
>
> A. Yes, I know that.
>
> * * *
>
> Q. Did you get a call from an operator on that day, and the operator asked you for information to try to help your son?
>
> A. Yes.
>
> Q. Is that the way it happened?
>
> A. Oh, my God, what a mess.
>
> * * *
>
> Q. Okay. Mrs. Freemon, if you could just go back, you said that what was in that paragraph was not true. Did something else happen? Did an AT&T operator call you and indicate to you that your son Elehue might be in trouble, and then ask you for help in order to get help for him? Is that what happened?
>
> A. Right.
>
> Q. Is that the way it happened?
>
> A. Uh-huh (indicating yes).
>
> Q. And –
>
> A. That he needed help.
>
> Q. And what did you say?
>
> A. I didn't think he needed help, but I had to call because the way he was talking. I heard him talking, and I thought he was sick, but actually, he was all right.
>
> Q. Okay. But at the time you thought he might be sick?
>
> A. Uh-huh (indicating yes).
>
> * * *
>
> Q. So did you tell the operator that it was okay for her to try to help your son?
>
> A. I believe I did, yeah.

*Id.* at 71-73. It was Mr. Freemon's burden to show that his mother earlier had a different recollection of the call than that indicated at her deposition or that she was so incompetent to recall or observe that her deposition should be given no credibility here. The proffered medical information does not address her capacity to give credible evidence. Thus, the medical letters are to no avail to establish that her deposition is "tainted." Furthermore, her incompetence to recall accurately the information given in her deposition is not established by the tenor of her deposition testimony,

15. A second attempt to "taint" Mrs. Freemon's deposition, made in passing by Freemon, *see* Br. at p. 12 ¶ 80, is also to no avail. Freemon claims that a sequestration order, FCC 94M-557,[5] by the ALJ against him and his mother at deposition negatively affected his *pro se* representation of

[5] The *Order* bears a release date of August 30, but it appears that the correct date should be September 30, 1994.

the complaint during his mother's cross-examination. The ALJ issued the order because he suspected that Mrs. Freemon's Notice of Appearance may have been "forged" by Mr. Freemon. *Memorandum Opinion and Order*, 94M-529, released September 16, 1994 at n.1. And, at the time of the issuance of the sequestration order, both Mr. and Mrs. Freemon were captioned as complainants and Mr. Freemon had not informed the ALJ that Mrs. Freemon purportedly had Alzheimer's. Tr. 338-341. In light of the suspicious circumstances and Mr. Freemon's failure to timely inform the ALJ that his mother had Alzheimer's, the ALJ cannot be faulted for requiring the sequestration of the putative complainants at their depositions.

16. As to Freemon's third exception, even if we assume that we can take official notice of the 911 telephone transcript of the emergency call[6] and that it accurately reflects the conversation between the AT&T operator, Ms. Zolnikov, and the dispatcher of the Bureau of Emergency Communications, the transcript does not support Freemon's contention that the operator stayed on the line and monitored any conversation between him and Mrs. Freemon before interrupting and alerting the emergency service. The 911 transcript, which includes a notation "this is *not* verbatim transcript," reads:

> M subj at this loc placed long distance call to mom in LA,,, then hung up ... Mom told operator to get help for her son, but did not have the address,,sed that he is strung out on drugs and needs help... No name for mom, but son is Eleue Freeman [sic]... Moms phone [ ]... traces to above.. Rockwood/Gresham Gym***C3 Amb and Fire Res Ordered.

Freemon Exh. 2 at pp. 10, 13 (rejected). Apparently, Freemon's argument is that Ms. Zolnikov and Mrs. Freemon never spoke of any drugs or alcohol and Ms. Zolnikov could only have learned about those facts from eavesdropping on the alleged conversation between Mr. Freemon and his mother. Br. at pp. 17-18 ¶ ¶ 138, 147. Additionally, Freemon refers to a part of Ms. Zolnikov's deposition where she responded to Mr. Freemon's questions by suggesting that a conversation did ensue. *Id.* at pp. 15-17 ¶ ¶ 101-134. Neither deponent could recall the details of their conversation and Ms. Zolnikov testified that at the time of her deposition her memory was impaired by heavy medication she was taking for cancer. *See* Judge's Exh. 1 at p. 71 and Exh. 3 at p. 8-10, 13-16. Their depositions, therefore, shed little light on the precise content of their conversation. However, in an Answer to the complaint, prepared by AT&T in 1990, which came prior to her prescription for cancer medication, Ms. Zolnikov verified that she had immediately told Mrs. Freemon when announcing the call that she believed a medical emergency existed and that Mrs. Freemon had told her to get medical assistance for her son. *Id.* at 18 ; *see also id.* at Attach. exh. 3 pp. 7-8. Mrs. Freemon's deposition testimony is not inconsistent with this answer. *See* para. 14, *supra.*

17. Moreover, AT&T adduced the testimony of Thomas C. Sharpe, then responsible for AT&T's technical equipment in operation on the night of the call, who explained that the operational and transmission characteristics of that equipment would not have permitted an operator to stay on the line and interrupt a call between two parties without both parties being able to hear the operator's voice. AT&T Exh. B at p. 5. Here, Freemon stated at hearing that he was blanked out and did not hear anything the operator said to his mother about the emergency. Tr. 181-182. Mr. Sharpe explained:

> When a party placing a collect call reached the AT&T operator position associated with a TSPS No. 1B [Traffic Service Position System], the operator would determine the call type and the name of the caller, and then advance the call to the called party to obtain call acceptance.

AT&T Exh. B at p.5. Sharpe continued:

> After the transmission path was established and call acceptance obtained, in the ordinary course the operator would release the position and turn to processing other calls. If the operator did not release the position, it would have been possible in a TSPS environment for the operator to reenter the conversation at later points and to converse with either one of the parties. *However, because of the characteristics of the voice transmission path established by the TSPS, any such intercession by the operator would have been audible to both parties to the call.*

*Id.* at p. 6 (italics added).

18. In contrast to the evidence above, Freemon's testimony is the only evidence adduced by Freemon to establish that the operator had improperly eavesdropped on the call and contacted emergency services without eliciting either his or his mother's consent. Freemon attributed the heavy breathing and sniffling heard by the telephone operator to his having just completed a strenuous exercise on a trampoline in a cold room. Judge's Exh. 2 at p. 179 (Freemon resided in his gym). He also asserted that he had not had any physical or mental problems at the time he called his mother on the night of May 30, 1988, Tr. 246; denied that he had attempted suicide, Tr. 286, 289-293; and claimed there had been no emergency, Tr. 286. The police and psychological reports depict an altogether different picture and wholly refute his testimony. The Police Report, which includes a statement and supplement by the reporting officer, reads:

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[6] A claim by Freemon that the 911 telephone transcript is already in the hearing record because it was part of a predesignation pleading accepted by the Commission is incorrect. *See* Br. at p. 14 ¶ ¶ 93-94, p. 19 ¶ 153. Pleadings filed with the Commission must be introduced into evidence before they become part of the hearing record. *See Oliver Kelley and Mary Ann Kelley*, 7 FCC Rcd 4239 (1992) (interrogatory answers not proffered during the hearing or tested by the crucible of cross-examination are not a part of the evidence in the case); *Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4248 ¶ 27 (Rev. Bd. 1991) (subsequent history omitted) (statements in application and in depositions are not in evidence where applicant failed to introduce them into record evidence).

> On 053088 [May 30, 1988] at 2251 [10:51 p.m.], I was dispatched to 2127 NW Elevenmile, on a check the welfare call. An unknown person from California called 911. This person said her son, a Mr. Freemon, called her. He said that he had taken some drugs. She wanted Police to check him to see if he was all right. Officer Ross and I arrived at 2258 [10:58 p.m.].
>
> The address we were given was the Rockwood Gym. It was owned by Elehue Kawi Freemon.
>
> The door to the building was unlocked. Officer Ross opened the door. He saw Freemon standing near a receptionist desk. Officer Ross found a Kitchen Knife next to Freemon's hand on the receptionist desk. Freemon appeared to be under the influence of a drug. The smell of an alcoholic beverage was emanating from his breath.
>
> I asked Freemon if he took any pills. He said "Yes." I asked what kind. He said "Sleeping pills." I asked how many. He said "I don't remember."
>
> Officer Ross searched the office area for a pill container. He found an empty Sleeping Pill box, Fred Meyer "Sleep Rite" brand, 72 tablets. The box was empty.
>
> Officer Ross found a suicide letter on the desk in the office. The note said on the front: Who ever finds this please don't send to my parents. To Edna or Evelyn Freemon.
>
> The note went on to say how he was sorry; the pressure was too much for me.
>
> ****
>
> An empty quart bottle of Sokol Blosser red wine was found in the office area.
>
> Freemon would not tell me when he took the pills. He would not tell me how many pills he took.
>
> Freemon did make several statements. He said "This won't go away." "My head is full and it won't forget." "I have to see Janee." (Janee is his girlfriend).
>
> Freemon tried to be violent. However, he was unable to cause any harm due to the influence of the ingested pills. I handcuffed Freemon for our safety. Freemon was examined by Fire Rescue and Buck Ambulance EMT's. Freemon was transported to Portland Adventist Hospital. Freemon was placed on a Police Officer Mental Hold. Freemon was lodged at PA. Freemon was treated by PA Hospital doctors for the overdose of pills.

AT&T Exh. E at Attach. exh. 3 (police report appended to AT&T Answer) pp. 21-24 (parenthesis original).

19. The police supplemental report continued:

> ... The Subject was very wobbly on his feet .... The man was obviously well under the influence of other than alcohol .... I read the letter which was obviously left as a suicide note .... I could hear the Black male saying "my mind just won't stop working."

*Id.* at 25-26. The psychological report, prepared while Freemon was being treated at the Portland Adventist Medical Center, corroborated the police reports:

> It was his [Freemon's] observation that he just wanted to get some sleep and he acknowledged that he decided he would just like to go to sleep forever, there is nothing to live for, he felt like everything was just going to pieces. He could not survive without Jan ....
>
> * * *
>
> The patient is ... still a little unsteady when he gets up from lying down which undoubtedly relates to his recent dose of alcohol and Benadryl.

AT&T Exh. D at Attach. exh. 20 (release authorization and discharge summary appended to Freemon deposition) pp. 4, 5. In addition, in his deposition, Freemon admitted that he had consumed three glasses of wine and ingested a number of sleeping pills before making the call, Judge's Exh. 2 at 183, 189 (Freemon's deposition), which could impair his recollection of the circumstances of the call.

20. Finally, Freemon's exception that the ALJ should not have rejected Mr. Freemon's medical records compiled during his hospitalization because the records would have corroborated his testimony that there was no justification for the emergency call is without merit. The ALJ rejected Freemon's Exh. 4, which includes the medical records, because Freemon had not produced the records by the date the requested documents were to be made available to AT&T, Tr. 107-112, and AT&T did not in fact have the documents by the time it deposed Mr. Freemon. *Id.* The ALJ also noted that certain of the records required someone to verify the technical terms. Tr. 111-12. Even assuming the accuracy of the records, which include significant amounts of handwritten data on all phases of Freemon's stay at the medical facility, it is difficult to conceive how, without expert assistance, the ALJ or reviewing authorities could accurately assess Freemon's physical condition the night of the call by merely reviewing the records. The ALJ acted well within his discretion in rejecting Mr. Freemon's medical records. Moreover, aspects of Freemon's Exh. 4 contradict rather than support Freemon's testimony there was nothing physically or mentally amiss the evening of the call. For example, the hospital progress report on the day after Freemon's arrival recounts that Freemon stated he "always has a tendency to be suicidal" and that, although Freemon "continues to deny that episode precipitating admission was a suicide attempt ... in next statement says he can't make it [illegible] Jan and becomes very agitated." Freemon Exh. 4 at 10, 12.

21. In sum, contrasted with the police and hospital reports at the time of the incident, Ms. Zolnikov's earlier recollection of the call, Mrs. Freemon's denial of the facts recited in the complaint, and Mr. Sharpe's testimony concerning the technical impossibility of the facts occurring as stated in the complaint, the documents proffered by Freemon, even if admitted into evidence, are not sufficient to meet Freemon's burden of proof in establishing that AT&T violated Section 705 of the Communications Act or committed any violation that would entitle him, or his

mother, to any monetary damages.[7] It is quite evident that the episode was, and still is, traumatic for Mr. Freemon; however, there is no persuasive evidence supporting the violation alleged in the complaint.

22. ACCORDINGLY, IT IS ORDERED, That the Motion to correct Complainants *Findings of Fact, issued January 29, 1995,* filed March 13, 1995, by Elehue Kawika Freemon, IS DISMISSED; that the Requests for Participation, filed March 24, and resubmitted on March 27, 1995, respectively, by James D. Waide, Edna Roland, Elehue Freemon (father), and Evelyn Freemon, as supplemented on March 28, 1995 ARE DISMISSED; and that the motion for late filing, filed by Dr. Gisela Spieler on April 10, 1995 IS DISMISSED; and

23. IT IS FURTHER ORDERED, That the formal complaint (File No. E-90-393) filed by Elehue Kawika Freemon and Lucille K. Freemon IS DISMISSED with prejudice with respect to Lucille K. Freemon, and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[7] Our holding that there was no violation of Section 705 does not rest on the chapter 119 exception that an operator may intercept and disclose communications while engaged in any activity that is a necessary incident to the rendition of her service. The *HDO* expressly recited that, to the extent an interpretation of the exception was required, the ALJ should forward to the General Counsel a request to solicit the views of the Department of Justice. 9 FCC Rcd at 4034 ¶ 10. It does not appear that any request was made in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-62**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Linden, Texas) | RM-8601 |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 1, 1995; Released: August 7, 1995**

By the Chief, Allocations Branch:

1. At the request of Cass County Radio ("petitioner"). the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 5126 (1995), proposing the allotment of Channel 257C3 to Linden, Texas. Petitioner filed comments restating its interest in applying for Channel 257C3 at Linden, if allotted. Linden Broadcasting Company filed comments supporting the allotment of a channel at Linden. No other comments were filed.

2. We believe the public interest would be served by allotment of Channel 257C3 to Linden, since it would provide the community with its first local aural transmission service. Channel 257C3 can be allotted to Linden in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections (4)i, 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 21, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Linden, Texas | 257C3 |

4. The window period for filing applications will open on **September 21, 1995**, and close on **October 23, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 257C3 at Linden are North Latitude 33-00-44 and West Longitude 94-21-55. As stated in the *Notice*, the allotment of Channel 257C3 at Linden is short-spaced to Station KPYN(FM), Channel 257A, Atlanta, Texas. However, Station KPYN(FM) was modified to specify operation on Channel 261C2 pursuant to *Third Report Order*, 7 FCC Rcd 470 (1992). Therefore, final licensing for Channel 257C3 at Linden may be delayed until Station KPYN(FM) is licensed on Channel 261C2 at the site specified in its construction permit.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

COMSAT CORPORATION

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended to Provide Satellite Services for the Provision of Public Switched and Private Line Services Between the United States and North Korea.

File No. I-T-C-95-310

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: July 31, 1995; Released: August 7, 1995**

By the Chief, Telecommunications Division:

1. The Commission has under consideration the above-captioned uncontested application, filed by COMSAT Corporation, through its COMSAT World Systems Division unit (COMSAT), seeking authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide satellite services for the provision of public switched and private line services between the United States and North Korea. Specifically, COMSAT requests blanket authority to provide the space segment services required by those U.S. carriers authorized by the Commission to provide public switched voice and data, and private line services between the United States and North Korea via the INTELSAT satellite located at $174^0$ East Longitude.

2. In a letter dated February 15, 1995, the U.S. Department of State requested that the Commission consider applications for authority to provide telecommunications services to the Democratic Peoples' Republic of Korea (North Korea)[1] COMSAT's application was filed pursuant to that letter. The Department of State letter did not impose conditions on the provision of services between the United States and North Korea.

3. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of telecommunications services between the United States and North Korea by COMSAT.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-95-310 IS GRANTED, and COMSAT is authorized to provide appropriate space segment capacity via the INTELSAT satellite located at $174^0$ East Longitude to any U.S. carrier authorized by the Commission to acquire such capacity from COMSAT for the provision of public switched voice and data, and private line telecommunications services between the United States and North Korea.

5. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that COMSAT shall file and have in effect a tariff for the services authorized in this Order before offering services to authorized U.S. carriers.

6. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] See Public Notice entitled FCC TO ACCEPT APPLICATIONS FOR SERVICE TO NORTH KOREA, Report No. I-8027, March 16, 1995.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP.

| | |
|---|---|
| Application for authority to convey capacity in the COLUMBUS II Cable System. | File No. I-T-C-95-325 |
| Application for authority to convey capacity in the TCS-1 Cable System. | File No. I-T-C-95-327 |
| Application for authority to convey capacity in the TAT-11 Cable System. | File No. I-T-C-95-360 |
| Application for authority to convey capacity in the TAT-10 Cable System. | File No. I-T-C-95-362 |
| Application for authority to convey capacity in the U.S.-Bahamas Cable System. | File No. I-T-C-95-363 |

**ORDER AND AUTHORIZATION**

**Adopted: July 31, 1995; Released: August 7, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-95-325, I-T-C-95-327, I-T-C-95-360, I-T-C-95-362 and I-T-C-95-363 ARE GRANTED, and AT&T Corp. (AT&T) is authorized to:

a. convey to its correspondent in Saudi Arabia on an Indefeasible Right of User (IRU) basis a one-half interest in 2 MIUs[1] of capacity in the COLUMBUS II Cable System between West Palm Beach, Florida and Palermo, Italy;

b. convey to Telefonica de Espana on an IRU basis a one-half interest in 60 MAUOs[2] of capacity in the TCS-1 Cable System between Puerto Rico and Colombia.

c. convey to its correspondent in Luxembourg on an IRU basis a one-half interest in one MIU of capacity in the TAT-11 Cable System between Manahawkin, New Jersey and St. Hilaire, France;

d. convey to IDB WorldCom Services, Inc. on an IRU basis a one-half interest in one MIU of capacity in the TAT-10 Cable System between Green Hill, Rhode Island and Alkmaar, Netherlands; and

e. convey to TRESCOM International on an IRU basis a one-half interest in 5 MAUOs of capacity in the U.S.-Bahamas Cable System.

3. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] A MIU is a unit designated as the minimum unit of investment in the COLUMBUS II, TAT-11 and TAT-10 Cable Systems, allowing the use of 2.048 Mbps and the additional 162,539.68 bps required for multiplexing in each direction.

[2] A MAUO is a 64-kbps circuit equivalent. Thirty MAUOs equal one MIU.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

N.W. COMMUNICATIONS, INC.

Application for authority to operate as an international resale carrier. File No. I-T-C-95-374

CALL ONE COMMUNICATIONS, INC.

Application for authority to operate as an international resale carrier. File No. I-T-C-95-378

**ORDER AND AUTHORIZATION**

**Adopted: July 31, 1995; Released: August 7, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested applications,[1] filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-95-374 and I-T-C-95-378 ARE GRANTED, and:

a. N.W. Communications, Inc. is authorized to provide international switched services by the resale of the international switched voice services set forth in MCI's Tariff FCC No. 1, between the United States and the points listed in that tariff; and

b. Call One Communications, Inc. is authorized to provide international switched services by the resale of the international switched voice services set forth in LDDS Metromedia Communications' Tariff FCC No. 2, between the United States and the points listed in that tariff.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating arrangements in each of the countries to which they provide service and shall file with the Commission any operating agreements with their correspondents within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services the applicant seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

7. IT IS FURTHER ORDERED that if either of the applicants intends to provide international call-back services through the use of uncompleted call signaling, its authorization to resell international switched voice and/or data services to provide these services is without prejudice to, and is expressly subject to action the Commission has taken in *VIA USA Ltd., et al.*, 9 FCC 2288 (1994), affirmed in Order on Reconsideration, FCC 95-224, released June 15, 1995.

8. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] AT&T Corp. filed Petitions to Deny both applications. The petitions were withdrawn after both applicants amended their applications.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Great Lakes of Iowa, Inc.
Complainant,

v. File No. WB/ENF-F-95-001

Triad Minnesota, L.P.
Defendant

FEDERAL COMMUNICATIONS COMMISSION

Howard C. Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

**ORDER**

**Adopted: August 1, 1995; Released: August 7, 1995**

By the Chief, Enforcement Division, Wireless Telecommunications Bureau:

1. On November 15, 1994, Great Lakes of Iowa, Inc. ("Great Lakes"), the cellular Block A licensee for the Iowa-15 Rural Service Area, filed the above-captioned formal complaint against Triad Minnesota, L.P ("Triad"), the cellular Block A licensee for the adjacent Minnesota-9 Rural Service Area. Great Lakes therein alleged that Triad was causing harmful interference to and capturing subscribers from Great Lakes' Cellular Geographic Service Area (CGSA) in violation of Sections 22.902(d) and 22.903(d) of the Commission's Rules. The complaint, in addition, contains allegations that Triad had extended its Service Area Boundaries into Great Lakes' CGSA, without consent, contract or coordination, in violation of Sections 22.902(d) and 22.903(d) of the Rules.

2. On July 21, 1995, the parties filed a Joint Motion For Dismissal With Prejudice of Formal Complaint. Therein, the parties state that they have concluded a Settlement Agreement under which Triad has agreed to modify the operating parameters employed at two of its cell sites and each party has agreed to change the frequency utilized for one of its control channels to eliminate existing interference problems.

3. The parties, by their settlement agreement, appear to have resolved the disputes giving rise to the complaint in a manner which is satisfactory to them and which will facilitate improved service to their customers. Accordingly, we believe that the dismissal of the complaint and the termination of this proceeding will serve the public interest by eliminating the need for further litigation and expenditure of further time and resources of the parties and the Commission.

4. Wherefore, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, that the joint motion of Great Lakes and Triad IS GRANTED.

5. IT IS FURTHER ORDERED that, pursuant to the request of the parties, the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Sammons Communications, Inc. CSR-4541-T

Request for Waiver of Section 76.502
of the Commission's Rules

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 25, 1995; Released: August 8, 1995**

By the Deputy Chief, Cable Services Bureau:

1. Sammons Communications, Inc. ("Sammons"), in the above captioned proceeding, has requested a waiver of 47 C.F.R. §76.502, the Commission's anti-trafficking rule, for its cable systems in Indiana, Tennessee, and New Jersey.[1] Sammons seeks this waiver to assure that the consummation of a transaction with Marcus Cable Associates, L.P. ("Marcus"), TCI of Pennsylvania, Inc. ("TCI"), TKR Cable Company ("TKR"), Suburban Cable TV Co., Inc. and Lenfest Atlantic, Inc. (both collectively referred to as "Lenfest") involving the cable systems that it has controlled for less than three years, will not violate the anti-trafficking rule. Sammons submits that a waiver is warranted because more than two-thirds of the subscribers of the systems to be sold are served by systems which, at the time of closing, will have been owned or controlled by Sammons for more than three years. The request is unopposed.

2. Section 76.502 of the Commission's rules implements Section 617 of the Communications Act, as amended, that, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of the system.[2] The Commission has broad discretion to grant waivers of the holding requirement.[3]

3. The three-year holding requirement rule, and the underlying statutory provision, are aimed at restricting transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, and are not intended to inhibit investment in the cable industry or delay or disrupt legitimate transactions.[4] Recently, the Commission stated that unless a transaction raises serious concerns on its face or any objections filed provide other public interest bases for concern, requests for waiver of the three-year holding requirement will generally be looked on favorably.[5] The Commission also has determined that waiver applications will be looked upon favorably if two-thirds or more of the MSO's subscribers are served by systems owned for three years or more, and if the MSO transfers several systems in a single transaction in which two-thirds of the subscribers of the systems being transferred are served by systems the MSO owned for three or more years.[6]

4. Sammons states the following facts in support of its petition. Sammons either directly or through wholly-owned subsidiaries, owns an operates cable systems serving in the aggregate approximately 1,067,000 subscribers. Sammons has entered into an agreement to sell cable systems serving approximately 855,900 of its subscribers to Marcus. Cable systems located in Pennsylvania and New Jersey, which serve the remaining 431,800 subscribers, will be divided among TCI, TKR, and Lenfest. The parties currently intend to consummate the transactions during the fourth quarter of 1995.

5. Sammons submits that a waiver of the holding period is warranted because, at closing, systems serving approximately 91% of all subscribers served by the systems to be sold will have been owned by Sammons for more than three years. As of April 30, 1995, Sammons owned cable systems serving 1,067,000 subscribers. Approximately 99,630 of those subscribers, or 9% of the total base, are served by systems which were acquired on or before October 1, 1992. Because the transaction will not occur until October 1, 1995 at the earliest, more than three years will have passed since acquisition of systems serving well in excess of two-thirds of the total number of subscribers involved in the proposed transaction. Sammons also notes that because many of the franchises subject to the proposed transaction require the prior approval of the franchising authority, it asks that the Commission grant the waiver request conditioned upon the parties obtaining any necessary franchise approvals. Sammons concludes by asserting that the proposed transaction satisfies the waiver standard set forth in Section 76.502 of the rules.

6. We will grant Sammons's waiver request with respect to the cable systems in Columbus, IN; New Albany, IN; Connersville, IN; Crawfordsville, IN; Monticello, IN; Peru, IN; Morristown, TN; and Pleasantville, NJ. Sammons has sufficiently demonstrated that two-thirds or more of its subscribers subject to the proposed transaction will have been held for more than three years upon the date of closing. We believe that the grant of the waiver and the transfer would not adversely affect the policies underlying the anti-trafficking rule and are not expected to adversely affect cable rates or services in the affected franchise areas. Moreover, no oppositions have been filed against the waiv-

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[1] The cable systems subject to the transaction, and held less than three years, include: Columbus, IN; New Albany, IN; Connersville, IN; Crawfordsville, IN; Monticello, IN; Peru, IN; Morristown, TN; and Pleasantville, NJ.

[2] 47 C.F.R. § 76.502; Section 617 of the Communications Act of 1934, as amended, 47 U.S.C. § 537.

[3] 47 U.S.C. § 537(d); *see also Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), First Report and Order,* ¶ 78, 8 FCC Rcd 6828, 6839 (1993), *recon. granted in part and denied in part, Memorandum Opinion and Order on Reconsideration of the First Report and Order,* 10 FCC Rcd 4654 (1995); 47 C.F.R. § 76.502(g).

[4] *First Report and Order, id* at ¶ ¶ 11, 21 & 36, 8 FCC Rcd at 6830-31, 6833.

[5] *Memorandum Opinion and Order on Reconsideration of the First Report and Order,* 10 FCC Rcd at 4687.

[6] 8 FCC Rcd at 6836; 47 C.F.R. § 76.502(g)(1).

er or concerning the proposed transaction. The waiver is therefore granted conditioned upon the approval of the transfer by the relevant local franchising authorities.[7]

7. In view of the above, IT IS ORDERED that, the captioned request for waiver of 47 C.F.R. §76.502 filed by Sammons Communications, Inc. IS CONDITIONALLY GRANTED upon approval of the transfers by the relevant local franchising authorities.

8. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[7] *See* 8 FCC Rcd at 6839 ("[T]he grant of .... conditional waivers will enhance the speed and efficiency of the waiver process, without undermining the discretion of the local franchising authority to approve or disapprove a proposed transfer, especially where multiple franchise authority approvals are necessary.")

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Cencom Cable Television, Inc. CSR-4535-T

Request for Waiver of Section 76.502
of the Commission's Rules

## MEMORANDUM OPINION AND ORDER

**Adopted: July 25, 1995; Released: August 8, 1995**

By the Deputy Chief, Cable Services Bureau:

1. Cencom Cable Television, Inc. ("Cencom"), in the above captioned proceeding, has requested a waiver of 47 C.F.R. §76.502, the Commission's anti-trafficking rule, for its cable systems in California.[1] Cencom seeks this waiver to assure that the consummation of a transaction with Charter Communications Entertainment II, L.P. or an affiliate ("Charter"), involving three of the cable systems that it has controlled for less than three years, will not violate the anti-trafficking rule. The request is unopposed.

2. Section 76.502 of the Commission's rules implements Section 617 of the Communications Act, as amended, that, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of the system.[2] The Commission has broad discretion to grant waivers of the holding requirement.[3]

3. The three-year holding requirement rule, and the underlying statutory provision, are aimed at restricting transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, and are not intended to inhibit investment in the cable industry or delay or disrupt legitimate transactions.[4] Recently, the Commission stated that unless a transaction raises serious concerns on its face or any objections filed provide other public interest bases for concern, requests for waiver of the three-year holding requirement will generally be looked on favorably.[5] The Commission also has determined that waiver applications will be looked upon favorably if two-thirds or more of the MSO's subscribers are served by systems owned for three years or more, and if the MSO transfers several systems in a single transaction in which two-thirds of the subscribers of the systems being transferred are served by systems the MSO owned for three or more years.[6]

4. Cencom states the following facts in support of its petition. Cencom is a multiple system operator with cable television systems serving more than 30 communities in California and South Carolina with approximately 150,000 subscribers. On March 30, 1995, Cencom entered into an "Asset Purchase Agreement" whereby its California and South Carolina systems will be sold to Charter. All but three of the systems have been owned or controlled by Cencom since at least October, 1989. Three of the systems, with some 4,061 subscribers, were acquired in November, 1993. According to Cencom, these subscribers represent just 2.48% of the total number of subscribers held for more than three years. Cencom therefore asks for a waiver on the basis that two-thirds or more of its subscribers in the proposed transaction are served by systems owned by the cable operator for three years or more.

5. We will grant Cencom's waiver request with respect to the three cable systems in LA County, Duarte, and Pasadena. Cencom has sufficiently demonstrated that two-thirds or more of its subscribers subject to the proposed transaction have been held for more than three years. We believe that the grant of the waiver and the transfer would not adversely affect the policies underlying the anti-trafficking rule and are not expected to adversely affect cable rates or services in the affected franchise areas. Moreover, no oppositions have been filed against the waiver or concerning the proposed transaction. The waiver is therefore granted conditioned upon the approval of the transfer by the relevant local franchising authorities, if such approval is required by contract or local and state law.[7]

6. In view of the above, IT IS ORDERED that, the captioned request for waiver of 47 C.F.R. §76.502(a) filed by Cencom Cable Television., Inc. IS CONDITIONALLY GRANTED upon approval of the transfers by the relevant local franchising authorities.

7. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.

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[1] The cable systems subject to the transaction, and held less than three years, include: LA County - Duarte, CA (1,270 subscribers), Duarte, CA (2,549 subscribers), and Pasadena (232 subscribers).

[2] 47 C.F.R. § 76.502; Section 617 of the Communications Act of 1934, as amended, 47 U.S.C. § 537.

[3] 47 U.S.C. § 537(d); *see also Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), First Report and Order,* ¶ 78, 8 FCC Rcd 6828, 6839 (1993), *recon. granted in part and denied in part, Memorandum Opinion and Order on Reconsideration of the First Report and Order,* 10 FCC Rcd 4654 (1995); 47 C.F.R. § 76.502(g).

[4] *First Report and Order, id* at ¶ ¶ 11, 21 & 36, 8 FCC Rcd at 6830-31, 6833.

[5] *Memorandum Opinion and Order on Reconsideration of the First Report and Order,* 10 FCC Rcd at 4687.

[6] 8 FCC Rcd at 6836; 47 C.F.R. § 76.502(g)(1).

[7] We note that Cencom has not indicated that it obtained the requisite approval for the transfers from the relevant local franchising authorities. *See* 10 FCC Rcd at 4673, n.95 ("As with any anti-trafficking waiver granted by the Commission, whether a small system blanket waiver or an individual waiver, the underlying transfer remains subject to receipt of local franchise authority transfer approval where such approval is required by the terms of the franchise agreement or applicable state or local law.") However, this showing shall not be an impediment in granting petitioner's waiver request here. *See* 8 FCC Rcd at 6839 ("[T]he grant of .... conditional waivers will enhance the speed and efficiency of the waiver process, without undermining the discretion of the local franchising authority to approve or disapprove a proposed transfer, especially where multiple franchise authority approvals are necessary.")

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

SLT Cable T.V., Inc. CSR-4532-T
Partnership

Request for Waiver of Section 76.502
of the Commission's Rules

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 25, 1995; Released: August 8, 1995**

By the Deputy Chief, Cable Services Bureau:

1. SLT Cable T.V., Inc. ("SLT"), in the above captioned proceeding, has requested a waiver of 47 C.F.R. §76.502, the Commission's anti-trafficking rule, for its cable systems in Texas.[1] SLT seeks this waiver to assure that the consummation of a transaction with Northland Telecommunications Corporation (Northland) involving several of the cable systems that it has controlled for less than three years, will not violate the anti-trafficking rule. The request is unopposed.

2. Section 76.502 of the Commission's rules implements Section 617 of the Communications Act, as amended, that, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of the system.[2] The Commission has broad discretion to grant waivers of the holding requirement.[3]

3. The three-year holding requirement rule, and the underlying statutory provision, are aimed at restricting transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, and are not intended to inhibit investment in the cable industry or delay or disrupt legitimate transactions.[4] Recently, the Commission stated that unless a transaction raises serious concerns on its face or any objections filed provide other public interest bases for concern, requests for waiver of the three-year holding requirement will generally be looked on favorably.[5]

4. The 1992 Cable Act expressly exempts from the restriction: "(1) any transfer of ownership interest in any cable system which is not subject to Federal income tax liability; (2) any sale required by operation of any law or any act of any Federal agency, any State or political subdivision thereof, or any franchising authority; and (3) any sale assignment, or transfer, to one or more purchasers, assignees, or transferees controlled by, controlling, or under common control with, the seller, assignor, or transferor."[6] The Commission has interpreted the exemptions to apply to changes of control that are the result of tax exempt transactions, involuntary transfers and transfers involving municipally owned cable systems, and *pro forma* transfers or assignments.[7]

5. SLT states the following facts in support of its petition. On December 14, 1992, SLT was acquired as an ancillary part of a larger transaction under which SLT's parent corporation, SLT Communications, Inc., was acquired by ALLTEL Corporation ("ALLTEL"). As part of the same transaction, ALLTEL took control of Sugar Land Telephone Company ("Sugar Land"),[8] an affiliate of SLT and a wholly owned subsidiary of SLT Communications, Inc. ALLTEL, by virtue of its acquisition of the shares of SLT Communications, Inc., came to control SLT and the 18 cable franchises subject to the instant waiver. These cable franchises are operated as 12 independent cable systems through 12 headends. Each franchise serves between 64 and 1,482 subscribers. According to SLT, 8 of the 12 systems serve less than 1,000 subscribers and therefore are subject to the Commission's blanket waiver under 47 C.F.R. §76.502(g)(2). However, the number of subscribers served by each of the remaining systems exceeds the 1,000 subscriber waiver limit by a *de minimis* number in each instance.

6. SLT now proposes to sell the systems to Northland Telecommunications Corporation. Consummation of the transaction is subject to both the approval of local franchising authorities and the Commission's grant of the waiver request. Northland currently controls other cable systems located adjacent to, or in close proximity with, several SLT systems. According to petitioner, the consolidation of the operation of certain Northland and SLT systems could create operational efficiencies and other economies of scale which are in the public interest and which would not otherwise be possible. SLT asks that the Commission apply the small system blanket waiver to those systems which are to be transferred to Northland and which operate with fewer than 1,000 subscribers. SLT further seeks waiver of the anti-trafficking provisions with respect to SLT's other

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[1] The cable systems subject to the transaction include: Coolidge (TX 0937); Groesbech (TX 0274); Lake Mexia (TX 1765); Mexia (TX 1764); Tehuacana (TX 1868); Hillsboro (TX 0544--1509); Mt. Calm (TX 1933); Jewett (TX 1256); Kaufman (TX 0710); Oak Grove (TX 1959); New Waverly (TX 1196); Rice (TX 1732 and TX 1733); Waterwood (TX 0542 and TX 0585); Eureka (TX 1953); Mildred (TX 1962); and Wortham (TX 1951).

[2] 47 C.F.R. § 76.502; Section 617 of the Communications Act of 1934, as amended, 47 U.S.C. § 537.

[3] 47 U.S.C. § 537(d); *see also Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), First Report and Order,* ¶ 78, 8 FCC Rcd 6828, 6839 (1993), *recon. granted in part and denied in part, Memorandum Opinion and Order on Reconsideration of the First Report and Order,* 10 FCC Rcd 4654 (1995); 47 C.F.R. § 76.502(g).

[4] *First Report and Order, id* at ¶ ¶ 11, 21 & 36, 8 FCC Rcd at 6830-31, 6833.

[5] *Memorandum Opinion and Order on Reconsideration of the First Report and Order,* 10 FCC Rcd at 4687.

[6] 47 U.S.C. §537(c).

[7] P *See Report and Order,* 8 FCC Rcd at 6837-39.

[8] Sugar Land is a wireline local exchange carrier providing local telephone service in each of the SLT cable franchise territories. It provides cable service pursuant to the rural exception to the Commission's cable/telco cross-ownership ban. *See* 47 C.F.R. §63.58.

headends and systems[9] which serve more than 1,000 subscribers. SLT asserts that the transaction anticipates no adverse effects to subscribers with respect to either service or rates nor does the proposed transaction raise any "profiteering" concerns since the sale price is approximately $70,000 less than the "book value" of the SLT assets.

7. Under the blanket waiver authority set forth in Section 76.502(g)(2) of our rules, which itself grants a waiver, the sale of the cable systems with under 1000 subscribers would not violate the Commission's anti-trafficking prohibitions. Moreover, we extend the blanket waiver to the relevant cable systems where more than 1000 subscribers are involved. Consistent with our anti-trafficking policy, we believe the proposed transaction will likely result in operational efficiencies that otherwise would not result absent a waiver. Wetherefore conclude that the amount of subscribers over the 1000 limit is *de minimis* in this instance and, in the absence of any formal opposition, grant of a waiver for these systems would be in accord with the public interest. The waiver is granted conditioned upon the approval of the transfer by the relevant local franchising authorities, if such approval is required by contract or local and state law.[10]

8. In view of the above, IT IS ORDERED that, the captioned request for waiver of 47 C.F.R. §76.502(a) filed by SLT Cable T.V., Inc. IS CONDITIONALLY GRANTED upon approval of the transfers by the relevant local franchising authorities.

9. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

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Deputy Chief, Cable Services Bureau

[9] These include the cable systems serving Groesbech, Mexia, Hillsboro, and Kaufman, Texas.

[10] We note that SLT has not yet obtained the requisite approval for the transfers from the relevant local franchising authorities. *See* 10 FCC Rcd at 4673, n.95 ("As with any anti-trafficking waiver granted by the Commission, whether a small system blanket waiver or an individual waiver, the underlying transfer remains subject to receipt of local franchise authority transfer approval where such approval is required by the terms of the franchise agreement or applicable state or local law.") However, this requirement shall not be an impediment in granting petitioner's waiver request here. *See* 8 FCC Rcd at 6839 ("[T]he grant of .... conditional waivers will enhance the speed and efficiency of the waiver process, without undermining the discretion of the local franchising authority to approve or disapprove a proposed transfer, especially where multiple franchise authority approvals are necessary.")

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Johnson Broadcasting Inc. against Prime Cable of Fort Bend L.P. and Prime Cable Income Partners, L.P. — CSR-4396-M

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 25, 1995; Released: August 8, 1995**

By the Deputy Chief, Cable Services Bureau:

## INTRODUCTION

1. Johnson Broadcasting, Inc. (hereinafter "KNWS-TV"), licensee of Station KNWS-TV (Ind., Channel 51), Katy, Texas, filed a complaint against Prime Cable of Fort Bend, L.P. and Prime Cable Income Partners, L.P. (hereinafter "Prime Cable") in the captioned proceeding for the latter's failure to comply with the channel positioning requirements of the Commission's Rules and the 1992 Cable Act on ten cable systems located in the Houston, Texas ADI. This complaint was denied in *Complaint of Johnson Broadcasting Inc. against Prime Cable of Fort Bend L.P. and Prime Cable Income Partners, L.P.* (hereinafter "*Complaint of Johnson Broadcasting*").[1] Now pending is a petition for reconsideration of that decision filed by KNWS-TV; an opposition filed by Prime Cable; and a reply filed by KNWS-TV.

## BACKGROUND

2. Section 76.57 of the Commission's Rules was adopted to implement §4 of the Cable Television Consumer Protection and Competition Act of 1992 (hereinafter "1992 Cable Act").[2] It allows a commercial broadcast station with mandatory cable television carriage rights to elect carriage on the cable system channel on which the station is broadcasting over-the-air, on the channel on which the station was carried on July 19, 1985, or on the channel on which the station was carried on January 1, 1992. KNWS-TV's signal is broadcast over-the-air on channel 51. KNWS-TV is a new television station that was not operational and thus was not carried by any cable system on July 19, 1985, or January 1, 1992.

3. In its initial filings in this proceeding, KNWS-TV requested that the Commission order the cable systems in question to carry its signals on either cable channel 9 or channel 14 and impose a $500,000 forfeiture. The cable operator responded that, with respect to the relevant cable systems, it did not have a channel 51 and thus was not obliged to carry the signal on channel 51 and that since the station had not been broadcasting on July 19, 1985, or January 1, 1992, it had no channel position rights based on historical carriage. Thus, after negotiating with the station and coming to no mutually agreeable solution, it placed the signal on other basic tier channels. The underlying decision concluded that, given the absence of historic carriage, the station's

> only rights to on channel carriage rest with the channel on which it broadcasts over-the-air. Prime Cable is in compliance with the Commission's must carry regulations in that it is carrying Station KNWS-TV on cable channel 51 as required. As a result, Station KNWS-TV's channel position request [for channel 9 or 14] is unfounded.

## RECONSIDERATION REQUEST AND RESPONSIVE PLEADINGS

4. In its reconsideration request, KNWS-TV asserts that *Complaint of Johnson Broadcasting* erred when it found that Prime Cable was carrying the station on cable channel 51 and notes that the system had admitted that it was not able to carry the signal of KNWS-TV on the station's over-the-air channel (channel 51) because none of its systems have 51 channels of capacity. It then cites §76.57(c) of the rules which provides that a must-carry signal "may be carried on such other channel number as is mutually agreed upon by the station and the cable operator." Having negotiated with Prime Cable and having failed to reach a mutually agreed upon channel, KNWS-TV requests the Bureau to

> (1) Reconsider and reverse its decision; and
>
> (2) Issue an order requiring Prime Cable to carry the signal of KNWS-TV on either its cable channel 9 or 14.

5. In its opposition, Prime Cable indicates that KNWS-TV is not being carried on channel 51 of the systems in question because they do not have 51 channels and it is technically impossible to carry KNWS-TV on channel 51, that existing channel locations were arrived at after good faith efforts to negotiate a channel acceptable to KNWS-TV came to no mutually agreeable resolution, and that *Complaint of Johnson Broadcasting* was correct in concluding that KNWS-TV had no right to carriage on channels 9 or 14. In reply, KNWS-TV reiterates that *Complaint of Johnson Broadcasting* was incorrect and that "under Section 76.57(c), the parties must mutually agree upon a cable channel for KNWS-TV."

## DISCUSSION

6. KNWS-TV is correct that the underlying decision erroneously indicated that carriage on channel 51 was already taking place. With respect to this point the parties are in agreement and the facts are not in dispute. KNWS-TV is incorrect, however, in its argument that it is entitled to

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[1] 10 FCC Rcd at _____ (DA 95-587, released June 12, 1995).
[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

insist on carriage on channel 9 or 14. Neither §4 of the 1992 Cable Act; its legislative history; §76.57 of the rules which implements §4; nor the Commission's *Report and Order in Docket 92-259*, 8 FCC Rcd 2965 (1993) adopting §76.57 provide support for the type of carriage order that the Bureau is urged to adopt.[3] The rules and statute provide that must carry stations may be carried: 1) on their over-the-air channel position, 2) on the channel the station was carried on July 19, 1985, 3) on the channel on which the station was carried on January 1, 1992, or 4) on another channel mutually agreed upon by the station and the cable operator. "The election of which of [the first] three alternatives to choose is left up to the station involved."[4] A station may seek to obtain carriage on another channel if it wishes to, but is not entitled to insist on carriage on another channel in the absence of the agreement of the cable operator. The forth provision of the 1992 Act permits cable system operators and television station licensees to reach an agreement outside of the three other statutory options. It, however, does not mandate agreement. Station KNWS-TV provides no citation or other support in its reconsideration petition for the proposition that the Commission may order carriage under this provision of the statute on a channel that has not been "mutually agreed upon."

**ORDER**

7. Accordingly, IT IS ORDERED, that the petition for reconsidered filed by Johnson Broadcasting, Inc. of the Bureau's *Memorandum Opinion and Order* (DA 95-587, released June 12, 1995) IS DENIED.

8. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

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Deputy Chief, Cable Services Bureau

[3] Nor do we believe its argument is consistent with the common understanding of the rules. No carriage or order of the type requested has been adopted by the Commission since passage of the 1992 Cable Act.
[4] 8 FCC Rcd at 2986.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

| | |
|---|---|
| Complaint of Pentecostal | CSR-4484-M |
| Revival Association, Inc. | FL0907 |
| against Continental Cablevision | |
| of Jacksonville, Inc. | |

Request for Carriage

## MEMORANDUM OPINION AND ORDER

**Adopted: July 25, 1995; Released: August 8, 1995**

By the Deputy Chief, Cable Services Bureau:

1. On March 3, 1995, Pentecostal Revival Association, Inc. ("PRA"); licensee of low power television station W49AW (Channel 41), Palatka, Florida, filed a complaint against Continental Cablevision of Jacksonville, Inc., for Continental's failure to carry W49AW on its cable system serving Putnam County, Florida. An opposition and supplemental reply were filed by Continental on March 27 and April 10, 1995, respectively, to which PRA has replied.

## SUMMARY OF PLEADINGS

2. In support of its petition, PRA argues that W49AW meets all the qualifications under the Commission's LPTV signal carriage rules. PRA states that W49AW has served Putnam County for over three years and is the only station which provides locally originated, children's and religious programming for the area. It indicates that it requested carriage on Continental's system by letter dated January 17, 1995, but to date has received no response from the system. PRA therefore requests that the Commission enforce its must carry requirements insofar as they refer to Continental.

3. In its opposition, Continental states that the Commission should deny W49AW's must carry request because it appears to be seeking carriage for a cable system in Palatka, Florida, an area which is not served by Continental.[1] In addition, Continental avers that W49AW's community of license, Putnam County, exceeds 35,000 in population and that therefore the station does not qualify for must carry status pursuant to §76.55(d)(5) of the Commission's rules. Continental contends further that W49AW fails to supply evidence (i.e., program guides or station log) that it meets all the obligations and requirements applicable to low power television stations with regard to children's programming. Moreover, Continental avers that PRA does not conform to the full power station rules under §76.55(d)(2) which would qualify W49AW for mandatory carriage -- PRA does not maintain a full-time presence at its broadcast studio and it does not maintain station logs.[2] Indeed, Continental states that on the day which it attempted to view W49AW's studio and its public inspection files,[3] no PRA personnel were available.

4. PRA states in response that it fully meets all the requirements set forth in §76.55 of the rules for qualified low power stations and that it is irrelevant that Continental serves only the unincorporated areas of Putnam County and not the community of Palatka, Florida. Moreover, PRA asserts that its community of license is Palatka, a community which has a population of less than 35,000 and lies outside of the 160 Metropolitan Statistical Areas as specified by §614(H)(2) of the 1992 Cable Act. PRA argues that it fulfills the requirements of §73.671 with regard to children's programming by broadcasting one full hour of children's programming each weekday night.[4] Further, it indicates that because W49AW's studio is located on the grounds of The Pentecostal Revival Academy, whose principal is also the director of the Pentecostal Revival Association, a full-time presence is maintained. On the day Continental mentions, argues PRA, the Academy had taken a school field-trip. Had Continental called in advance regarding its visit, PRA states that personnel would have been available. Finally, PRA confirms that W49AW is in full compliance with Commission regulations which require the maintenance of all necessary station logs. It points out that on a second visit on March 27th, Continental reviewed W49AW's public inspection file, children's programming file, political programming file and EEO file. It did not, however, request to review the station's programming log or Tower Light log.

5. In a reply to PRA's response, Continental avers that W49AW's own statements indicate that it fails to meet the children's programming requirements: a) the mainstay of its regular children's programming, "Davey and Goliath" is only 15 minutes in length which falls short of the Commission's requirement that a qualifying children's program be at least 30 minutes long; and b) the children's programming identified by PRA fills only seven weeks worth of one-hour programming; subsequent programming would likely be repetitive and would not serve children's needs. Moreover the fact that PRA carries promotional programming during its children's hour changes the fundamental character of that programming to "commercial" programming, which also falls short of Commission requirements. Continental also argues that the intention of the Commission is that a meaningful on-site presence be maintained at a studio and not merely near or available as is the case with W49AW. Continental avers that none of PRA's excuses can mask this failure. Finally, Continental contends that since the Commission's rules seem aimed at providing mandatory cable carriage to a low power station for its community of license and Continental does not serve

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[1] Continental states that it serves only the unincorporated areas of Putnam County, Florida.
[2] 47 C.F.R. §§73.1800 and 73.1820.
[3] March 24, 1995.
[4] PRA states that W49AW broadcasts the Lutheran Church of America video series "Davey and Goliath" which has 65 15-minute episodes, and 5 30-minute episodes, David Walters production of "Mr. Mustache" which has currently over 15 half-hour episodes, and W49AW's own production of "J.L. and His Friends for Jesus" which is an on-going series with over 15 half-hour programs so far. Other video series are used when acquired.

Palatka, W49AW's community of license, Continental concludes that it should not be required to provide carriage for W49AW on its system in Putnam County.

6. PRA's rebuttal to the reply states initially that it provides one full hour of children's programming every weekday evening from 7:00 to 8:00 p.m. and that this hour is diversified into segments containing two 15-minute episodes of "Davey and Goliath" and one 30-minute episode of "Mr. Mustache." Other combinations are also used,[5] states PRA, which would eliminate the appearance of repetition. Secondly, PRA argues that Continental's assertion that its children's programming is promotional or commercial in nature is unfounded. PRA avers that W49AW does not promote any service, product, individual church, or denomination through its children's programming and any program it uses could be telecast on any television station in America. Third, with regard to its studio, PRA states that the Pentecostal Revival Center has services 4 times a week, the studio is occupied frequently by volunteers, and the station itself is generally manned with at least 2 to 3 individuals each week day evening. Only on rare exceptions, it continues, is only one person present at the studio. Fourth, W49AW has provided numerous details of its qualifications and it emphasizes here specifically that: 1) there is no full power station licensed to any community within Putnam County; 2) W49AW complies fully with all FCC rules regarding children's programming, local programming and EEO obligations; 3) W49AW delivers a good quality signal to Continental's headend; 4) W49AW is located within 35 miles of Continental's headend; 5) both the cable system and W49AW are located outside of the 160 largest Metropolitan Statistical Areas as of June 30, 1990; and 6) Palatka, Florida, W49AW's community of license, has a population of less than 35,000. Fifth and finally, PRA maintains that the must carry rules provide for the carriage of a low power station in situations where "the community of license of such station and the franchise area of the cable system are both outside of the largest 160 Metropolitan Statistical Areas. . . ."[6] As this is the case here, PRA concludes that Continental's argument with regard to Putnam County is pointless.

## DISCUSSION

7. Both the Communications Act of 1934, as amended, and the Commission's Rules requires the carriage of "qualified" LPTV stations in certain limited circumstances.[7] An LPTV station that conforms to the rules established for LPTV stations in Part 74 of the Commission's Rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices and the Commission determines that the programming of the LPTV station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of geographic distance of such full power stations from the low power station's community of license; 3) it complies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles from the cable system's headed and delivers to the principal headed an over-the-air signal of good quality; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.[8]

8. We are not persuaded by the arguments raised by Continental herein and shall grant PRA's petition. First, Continental's assertion that W49AW is not eligible for carriage on its system in Putnam County because the station is licensed to Palatka, Florida, is in error.[9] Section 76.55(d)(4) and (6) of the Rules requires that the LPTV station be located no more than 35 miles from the cable system's principal headed and that there is no full power television broadcast station licensed to any community within the county served by the cable system. Both of these conditions apply here. Therefore, on this basis, W49AW is eligible for carriage in Putnam County. Secondly, we are satisfied that PRA maintains the required station logs and conforms to the minimum operating schedule for television broadcast stations outlined in Part 73 of our Rules. There is no requirement than an LPTV station staff its studio as if it were a full power station in order to qualify for carriage and no separate Commission requirement that personnel be present at an LPTV broadcast studio during periods in which the station is not in operation. Indeed, there is no requirement that personal be present at a low power station unless it is broadcasting origination programing.[10] Third, from the evidence before us, W49AW fully conforms the Commission's requirements regarding children's programming. Under §76.671 of the Commission's Rules, television licensees are required to provide some children's programming[11] but the Commission does not substitute its judgment in the place of broadcasters to determine how they should provide such programming.[12] The Commission has stated that "we believe that short-segment programming has a place in serving children's educational and informational needs. . . . We will thus permit short-segment material to contribute to fulfilling the programming renewal review requirement , although broadcasters must air some standard-length children's programs in order to fulfill this

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[5] PRA indicates that this hour is also filled using one 30-minute episode of "J.L. and His Friends for Jesus" and one 30-minute episode of "Mr. Mustache."

[6] 47 C.F.R. §76.55, paragraph 5.

[7] 47 U.S.C. §534(c)(1); 47 C.F.R. §76.56(b)(3).

[8] 47 U.S.C. §534(h)(2); 47 C.F.R. §76.55(d).

[9] Initially, Continental mistakenly identified W49AW's community of license as Putnam County instead of the community of Palatka.

[10] *See* section 76.734 of the Commission's rules.

[11] 47 C.F.R. §76.671. Educational and informational television programming is any television programming that furthers the positive development of children 16 years of age and under in any respect, including the child's cognitive/intellectual or emotional/social needs.

[12] *See Policies and Rules Concerning Children's Television Programming, Report and Order*, 6 FCC Rcd 2111, 2115. "Licensees with retain reasonable discretion to determine the manner in which they assess the educational and informational needs of children in their communities, provided that they are able to demonstrate the methodology used."

requirement.[13] While W49AW provides some 15-minutes programs within it daily hour broadcast, it does so in conjunction with at least one 30-minute program. PRA is therefore fully in compliance with §76.671 of the Rules. Finally, Continental has presented no evidence that PRA carries promotional programming during its children's hour. Such a general assertion is not sufficient to warrant a finding by this Commission that W49AW is not meeting its local programming responsibilities.

**ORDER**

9. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), that the complaint filed March 3, 1995, by Pentecostal Revival Association, Inc. against Continental Cablevision of Jacksonville, Inc. IS GRANTED. W49AW shall notify the relevant cable system in writing of its carriage and channel position elections (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable system shall come into compliance with the applicable rules within sixty (60) days of such notification.

10. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Service Bureau

[13] *Policies and Rules Concerning Children's Television Programming, Memorandum Opinion and Order*, 6 FCC Rcd 5093, 5101 (1991).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 93-157**

In the Matter of

Rules For the Filing of International
Circuit Status Reports.

**REPORT AND ORDER**

**Adopted: July 12, 1995; Released: August 9, 1995**

By the Commission:

## I. INTRODUCTION

1. In this Report and Order (Order), the Commission reduces the regulatory burden for international carriers and makes the remaining regulatory requirements more effective. The Commission does so by: (1) codifying requirements for the filing of international circuit status reports in the Commission's Rules; (2) reducing the frequency of filing such reports from monthly to annually; (3) directing the Chief, International Bureau to prepare a filing manual with reporting requirements for the annual circuit status reports; (4) requiring all facilities-based international carriers to file such reports; (5) directing the Chief, International Bureau to specify a format for the filing of those reports; and (6) requiring the filing of such reports on computer diskettes. These reporting requirements will enable us to accurately monitor the Omnibus Budget Reconciliation Act of 1993's (the Budget Act) annual fee collection for active 64 kilobit per second (Kb/s) circuits. In addition, this Order exempts nondominant international facilities-based carriers from filing the semi-annual circuit addition reports required by Section 63.15(b) of the Commission's Rules and reduces the frequency of filing such reports by international resale carriers reselling international private lines from semi-annually to annually.

## II. BACKGROUND

2. In the Notice of Proposed Rule Making (NPRM),[1] we noted that monthly circuit status reports have been filed by some U.S. international facilities-based common carriers since the early 1970's. Some of the requirements for these reports were set forth in Section 214 decisions authorizing the construction of submarine cable systems. When the reporting requirement was first initiated, all of the then existing U.S. international carriers filed reports. Not all subsequent facilities-based U.S. international carriers, however, were requested to file the monthly circuit status reports. Consequently, at present, only some of these carriers file such reports.[2] Because no format was specified, the carriers file the reports, on paper, in a variety of formats.

3. We further noted that we have reduced substantially and streamlined our regulation of U.S. international facilities-based carriers since the monthly circuit status reports were first instituted. We have concluded that, while the information in the reports remains valuable, we no longer need it on a monthly basis. Therefore, we proposed to reduce the filing frequency from monthly to annually. We also proposed to codify the requirement for the filing of annual circuit status reports and to require all international facilities-based carriers to file such reports. In addition, we proposed to direct the Chief, International Bureau to prepare a filing manual specifying a common format and proposed that annual reports be filed on computer diskettes. Seven carriers filed comments in response to the NPRM.[3] Three filed reply comments.[4]

## III. DISCUSSION

### A. Codification of International Circuit Status Report Filing Requirements.

4. We adopt our proposal to codify the requirement for filing annual circuit status reports. We will add therefore a new rule, Section 43.82, on this reporting requirement. Codification will inform all international carriers of the requirement. AT&T, IDB and Sprint specifically support our proposal to codify the requirement.

5. The information compiled by the Commission from the reports will be useful to current industry members, potential new entrants into the industry, and the Commission. This information will be aggregated and published by the Commission for the use and benefit of all industry members. It is critically important for U.S. carriers in the preparation of their international business plans. The availability of capacity, or the lack thereof, is fundamental to market entry and expansion decisions. The information is not available from any other reliable source. Publication of this information aids industry in determining competitive opportunities overseas and thereby supports our efforts to achieve a more competitive international telecommunications marketplace. In addition, since our NPRM was released, the Budget Act was passed. Section 6003(3) of that Act, *inter alia*, requires the Commission to collect annual regulatory fees on active equivalent 64 Kb/s international circuits. The annual circuit status reports will serve as a database for determining and monitoring the payment of these fees. Finally, the information contained in the reports also will allow us to continue to identify use of facilities as

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[1] Rules for the Filing of International Circuit Status Reports, 8 FCC Rcd 4902 (1993).

[2] At present, AT&T, Communications Satellite Corporation (Comsat), GTE Hawaiian Telephone Company, Inc. (HTC), MCI International, Inc. (MCII), TRT/FTC Communications, Inc. (TRT/FTC), U.S. Sprint Company, L.P. (Sprint) and Worldcom Inc. (Worldcom) file monthly circuit status reports.

[3] Those carriers are AT&T, COMSAT, GTE Service Corporation (GTE), IDB Communications Group (IDB), MCI Telecommunications Corporation (MCI), Sprint, and GE American Communications, Inc. (GE Americom). GE Americom's comments were filed after the filing deadline and were accompanied by a Request to Submit Late-Filed Comments. Since the late filing of GE Americom's comments did not delay this proceeding, we grant its request and accept its Comments.

[4] Those carriers are AT&T, IDB and MCI.

we streamline our facilities authorization procedures in our Notice of Proposed Rulemaking on streamlining the international Section 214 authorization process.

**B. Frequency of Filing of International Circuit Status Reports.**

6. We adopt our proposal to reduce the frequency of filing circuit status reports from monthly to annually. As set forth in the NPRM, the manner in which we regulate international common carrier facilities and services has changed significantly since the early 1970's. The Commission no longer specifies cable-satellite circuit fill formulas.[5] We also have instituted streamlined regulation of nondominant international common carriers.[6] We find that satisfaction of our obligations under the Budget Act is provided by the annual circuit status reports. Therefore, we adopt our proposal to reduce the frequency of filing circuit status reports from monthly to annually. All commenters responding to the NPRM supported this proposal. We also adopt our proposal that the circuit status reports be filed on or before March 31 of each year and provide the circuit status information specified below as of December 31 of the immediately preceding year.

**C. Requirement that all International Facilities-Based Common Carriers File Annual Circuit Status Reports.**

7. We also adopt our proposal to require all facilities-based international common carriers to file annual international circuit status reports.[7] This reporting requirement will enable us to monitor the Budget Act's annual active 64 Kb/s equivalent circuit fee collection requirement. The fact that the annual circuit status reports will now serve as the database for the regulatory fees for active 64 Kb/s international circuits specified by Section 6003(a) of the Budget Act will require some changes in the types of circuits that now commonly are reported in the monthly circuit status reports. Circuits for Canada and Mexico are international circuits included in the regulatory fees and now will have to be included in the annual circuit status reports. In their comments, AT&T, MCI and Sprint support the filing of international circuit status reports by all international facilities-based common carriers for the reasons set forth in the NPRM.

**D. Exemption of Nondominant International Facilities-Based Common Carriers from Filing Section 63.15(b) Circuit Addition Reports.**

8. GE Americom argues that the Commission should streamline further the regulation of nondominant international carriers by exempting such carriers from all reporting requirements. As an alternative, GE Americom asserts that the Commission should exempt international nondominant carriers from filing annual circuit status reports and require only the circuit addition reports under Section 63.15(b). In addition, GE Americom suggests that circuit addition reports should be filed only annually. As a third alternative, GE Americom requests that the Commission eliminate Section 63.15(b) circuit addition reports and have all international carriers file only annual circuit status reports. We deny GE Americom's first two requests and grant its third request in part.

9. There are numerous nondominant international facilities-based common carriers. In the aggregate, these carriers account for a substantial use of international facilities. Therefore, our ability to monitor payment of the Budget Act's fees on active 64 Kb/s equivalent circuits is significantly dependent on the circuit status reports filed by nondominant facilities-based international common carriers. Indeed, because there are many more nondominant international facilities-based common carriers than dominant carriers, the annual circuit status reports filed by the nondominant carriers will make up a substantial portion of the database for monitoring the payment of regulatory fees for active equivalent 64 Kb/s international circuits. Therefore, we require all international facilities-based common carriers to file annual circuit status reports, including such carriers that are classified as nondominant. It is our intention that the reporting requirements be the least intrusive and burdensome on industry as possible, consistent with allowing us to fulfill our statutory obligations. In furtherance of this objective, we are modifying the rule we are adopting to remove the requirement that circuit status information be filed on a transmission facility-by-transmission facility basis. We instead will require only that international facilities based carriers include the total number of activated and the total number of idle circuits by the categories of submarine cable, satellite and terrestrial facilities to geographic points for the services designated by the Chief, International Bureau.

10. AT&T, IDB, MCI and Sprint suggest that nondominant carriers required to file annual circuit status reports be exempted from filing the semi-annual circuit addition reports under Section 63.15(b). We agree. The annual status reports will contain the same information in the circuit addition reports. Since the annual circuit status reports will be filed on computer diskettes, deriving information on circuit additions from the circuit status reports will be relatively easy. Consequently, we are amending Section 63.15(b) to exempt nondominant international facilities-based common carriers from having to file semi-annual circuit addition reports.

**E. Reduction of Frequency of Filing Section 63.15(b) Circuit Addition Reports by Nondominant International Private Line Resale Carriers.**

11. Section 63.15(b) also requires nondominant carriers reselling international private lines to file semi-annual circuit addition reports.[8] Since we are not requiring interna-

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[5] The last of the cable-satellite fill formulas was abolished in 1987. *See Distribution of U.S. Carrier Circuits,* 3 FCC Rcd 2156 (1988).

[6] *See International Carrier Policies,* 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986). We are proposing to further streamline regulation of nondominant international carriers in our Notice of Proposed Rule Making in Streamlining the International Section 214 Authorization Process.

[7] For purposes of these reporting requirements, facilities-based international carriers are those that are authorized as such. Further instructions as to which circuits shall be reported as facilities-based will be contained in the filing manual to be prepared by the Chief, International Bureau.

[8] Section 63.15(b) currently provides that:

> Any party certified to provide non-dominant international communications services to a particular geographic market shall report circuit additions on a semi-annual basis. Circuit additions should indicate the specific services provided (*e.g.* IMTS or telex) and the country

tional private line resellers to file annual status reports, we will continue to require these international private line resellers to file circuit addition reports.[9] However, we will amend Section 63.15(b) to require that circuit addition reports be filed annually instead of semi-annually. The circuit addition reports must be filed not later than March 31 of each year and show the circuit additions for the preceding year.

**F. Preparation of Filing Manual.**

12. We adopt our proposal to direct the Chief, International Bureau to prepare a filing manual specifying reporting requirements for the annual circuit status reports. A number of the carriers responding to the NPRM support the adoption of this proposal but suggest that the international carriers meet with the International Bureau to provide input. We agree and direct the International Bureau to hold such meetings. We further direct that, to the extent possible, every effort be made to collect the necessary information consistent with the ways the carriers maintain such information for their own purposes.

13. We also direct the Chief, International Bureau to specify a format for the annual international circuit status reports in the filing manual. Our use of the information provided by those reports can be made more efficient if a common format for the reports is specified. We also require that those reports be filed on a common type and format of computer diskettes. As a result of these requirements, the Bureau will be able to combine data from the various carriers' reports.

**G. Confidentiality of Annual Circuit Status Reports.**

14. GTE and IDB urge that the information contained in the annual international circuit status reports be held confidential. In its comments, GTE asserts that the information in the international circuit status report should be treated as confidential since it would provide competitors access to highly competitive information. GTE states that other U.S. carriers and foreign competitors could use the information for their own business purposes. GTE asserts that in the increasingly competitive atmosphere of international telecommunications, it is important that specific route information, including the number of active and idle circuits, should not be available to competitors. Specifically, argues GTE, competitors could use this information to determine a carrier's routes, how traffic is routed, the capacity currently used to provide service and the readily available surplus. In its reply comments, IDB strongly supports GTE, asserting that information on the number of active and idle circuits, particularly when such information is provided on a country-by-country basis, is highly sensitive commercial information that under no circumstances should be available to competitors.

15. We conclude that in general the annual circuit status reports should not be held confidential. There are a number of reasons why those reports should be public. For example, the annual circuit status reports now also will serve as substitutes for the semi-annual circuit addition reports for the nondominant facilities-based international carriers. The circuit addition reports were instituted as an alternative to nondominant international carriers filing Section 214 applications for supplemental facilities.[10] The Section 214 applications for the supplemental facilities were public and the Commission anticipated that the circuit addition reports would be public as well. Indeed most nondominant carriers filing circuit addition reports file them on a non-confidential basis. A few such carriers requested confidentiality.[11] The fact the annual circuit status reports now will substitute for the circuit addition reports militates toward having those reports filed on a public basis. Having these reports available will enable the public to see the circuit additions made by the carriers just as the public was able to apprise itself of that information when nondominant carriers were required to file Section 214 applications for all of their supplemental facilities. The annual circuit status reports also will serve as the database which will be used to check payment of regulatory fees for active equivalent 64 Kb/s international circuits. We believe that this information should be public as well in order that the public may review the basis for the regulatory fees imposed on the carriers.

16. With respect to the concerns about the disclosure of routing information and information concerning the number of active and idle circuits, we note that the annual circuit status reports will contain that information for but a single day each year -- December 31. Moreover, that information need not be filed until three months after each December 31. Unlike the monthly circuit reports which were to be filed each month and within 20 days of the end of each month, we do not believe that the annual circuit reports will disclose a running account of a given carrier's operations. Moveover, traffic volumes are disclosed publicly on an annual basis for all international carriers when they file their Section 43.61 reports. International carriers required to file status reports are free to file properly supported requests for confidentiality under the Freedom of Information Act when they file their annual circuit status reports. We will not make a blanket finding that confidentiality is required on the record before us.

## IV. CONCLUSION

17. In this Order, we reduce the regulatory burden on traditional international facilities-based carriers. We codify the requirements for international circuit status reports and reduce the frequency of filing such reports from monthly to annually. By requiring all facilities-based international

served. These reports shall be filed on a consolidated basis on February 1 (covering facilities over which service was initiated during the preceding July 1 to December 31 period) and August 1 (covering facilities over which service was initiated during the preceding January 1 to June 30 period) of each year.

47 CFR § 63.15(b). International switched services resellers are not required to file circuit addition reports as they do not obtain circuits from underlying facilities-based carriers but rather purchase (directly or indirectly) switched services from such carriers.

[9] Because such private lines will be reported by the underlying carriers in the circuit status reports, requiring the resale carrier to file circuit status reports for those private lines would merely lead to double counting of such circuits.

[10] *See International Carrier Policies, supra,* note 6.

[11] Those requests are currently pending.

carriers to file annual circuit status reports, we have a database for monitoring the payment of regulatory fees for active international equivalent 64 Kb/s circuits. We also exempt nondominant facilities-based international carriers from filing the circuit addition reports required by Section 63.15(b). In addition, we reduce the frequency of filing circuit addition reports by international private line resellers from semi-annually to annually. The development by the International Bureau of a filing manual with a common format for the annual circuit status reports will significantly improve its ability to manipulate the data contained in the annual circuit status reports. We also provide for carrier input into the formulation of the filing manual.

## V. PROCEDURAL MATTERS; ORDERING CLAUSES

18. The analysis pursuant to the Regulatory Flexibility Act of 1980[12] is contained in Appendix B.

19. Accordingly, IT IS ORDERED that the rule changes as specified in Appendix A ARE ADOPTED.

20. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 90 days after publication in the Federal Register. This action is taken pursuant to Sections 4, 214, 219, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154, 214, 219, 303(r) and 403 (1995).

21. IT IS FURTHER ORDERED that the Chief, International Bureau shall develop a filing manual for the submission of international circuit status reports.

22. IT IS FURTHER ORDERED that the Chief, International Bureau shall direct the International Bureau Staff to meet with the facilities-based international common carriers on the development of the filing manual.

23. IT IS FURTHER ORDERED that this Report and Order does not alter the requirement that MCI Communications Corporation file monthly circuit status reports for U.S.-U.K. circuits as required by paragraph 65 of our Declaratory Ruling and Order, *MCI Communications Corporation*, 9 FCC Rcd 3960 (1994).

24. IT IS FURTHER ORDERED that the Request to Submit Late-Filed Comments filed by GE Americom IS GRANTED.

25. IT IS FURTHER ORDERED that this proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

## FINAL RULES

Parts 43 and 63 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 43 - Reports of communication common carriers and certain affiliates

1. The authority citation for Part 43 continues to read as follows:

**AUTHORITY: Secs. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs, 211, 219, 220, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.**

2. New Section 43.82 is added to read as follows:

**§ 43.82 International circuit status reports.**

(a) Each facilities-based common carrier engaged in providing international telecommunications service between the area comprising the continental United States, Alaska, Hawaii, and off-shore U.S. points and any country or point outside that area shall file a circuit status report with the Chief, International Bureau, not later than March 31 each year showing the status of its circuits used to provide international services as of December 31 of the preceding calendar year.

(b) The information contained in the reports shall include the total number of activated and the total number of idle circuits by the categories of submarine cable, satellite and terrestrial facilities to geographic points outside the United States for the services designated by the Chief, International Bureau.

(c) The information required under this section shall be furnished in conformance with instructions and reporting requirements prepared under the direction of the Chief, International Bureau, prepared and published as a manual.

(d) Authority is hereby delegated to the Chief, International Bureau to prepare instructions and reporting requirements for the filing of the annual international circuit status reports.

Part 63 - Extension of lines and discontinuance, reduction, outage and impairment of service by common carriers; and grants of recognized private operating agency status

1. The authority citation for Part 63 continues to read as follows:

**Authority: Sections 1, 4(i), 4(j), 201-205, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. secs. 151, 154(i), 154(j) 201-205, 218 and 403, unless otherwise noted.**

[12] 5 U.S.C. § 608.

2. Section 63.15(b) is revised to read as follows:

**§63.15 Special procedures for non-dominant international services.**

* * * * *

(b) Any non-dominant party certified to provide international resold private lines to a particular geographic market shall report its circuit additions on an annual basis. Circuit additions should indicate the specific services provided (*e.g.*, IMTS or private line) and the country served. This report shall be filed on a consolidated basis not later than March 31 for the preceding calendar year.

* * * * *

## APPENDIX B

### FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to Section 603 of Title 5, United States Code, 5 U.S.C. §603, an Initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rule Making in CC Docket No. 93-157. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

### A. NEED AND PURPOSE OF RULES.

This rule making proceeding was initiated in order to reduce the burden on those international facilities-based common carriers filing monthly circuit status reports by reducing the frequency of filing such reports from monthly to annually. The rule making also sought to make the information derived from the annual circuit reports more complete and, therefore, more useful to the Commission by requiring all international facilities-based common carriers to file them. In addition, the rule making sought to make handling of the information provided by the annual circuit reports easier by requiring the development of a filing manual setting forth the requirements for such reports, establishing a common format for the reports and requiring the filing of the reports on computer diskettes.

### B. ISSUES RAISED BY THE PUBLIC IN RESPONSE TO THE INITIAL ANALYSIS.

A number of parties proposed that nondominant international facilities-based common carriers which will be required to file annual circuit status reports be exempted from filing semi-annual circuit addition reports required by Section 63.15(b) of the Commission's Rules. We adopt this proposal. One commenter suggested that nondominant international carriers be exempted from all reporting requirements. We did not adopt that proposal because to do so would prevent the Commission from developing a database of active 64 kb/s circuits need for monitoring regulatory fees. A number of commenters also proposed that the carriers be permitted input to the formulation of the filing manual and format for the annual circuit status reports. We adopt that proposal.

### C. SIGNIFICANT ALTERNATIVES CONSIDERED.

We considered and adopted the parties' proposal that nondominant international facilities-based carriers which are required to file annual circuit status reports not be required to file semi-annual circuit addition reports. We also reduced the frequency of filing circuit addition reports from semi-annually to annually for those international carriers which must still file such reports. We also considered and adopted the parties' proposal that facilities-based international carriers be given an opportunity to provide input to the formulation of the filing manual and format for the annual circuit status reports.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Media Ventures

Adjustment for Interactive Video and Data Service (IVDS) Licenses

**ORDER**

**Adopted: August 2, 1995; Released: August 9, 1995**

By the Chief, Wireless Telecommunications Bureau:

1. On June 24, 1994, Media Ventures, a partnership in Springfield, Illinois, filed a FCC Form 175 application to participate in the Interactive Video and Data Service (IVDS) July 28 & 29, 1994, auction. In its original application, Media Ventures applied for fifteen markets.[1] The Commission's auction contractor informed Media Ventures[2] that its application contained a minor defect in item 9.[3] Media Ventures was instructed to complete items 1 and 7, correct item 9, sign the amended application, and resubmit it to the Commission's auctioncontractor by 5:30 PM EDT on July 14, 1994.[4]

2. Media Ventures resubmitted its application by the specified due date. In addition to correcting item 9, the amended application also changed the market designations contained in item 11 to include "all markets". This change was not detected until after the auction was completed. As a result, Media Ventures was allowed to bid on licenses for which it did not apply in its original application. Ultimately, Media Ventures was the high bidder on several licenses in markets that were not listed on its original application.[5] When this situation was brought to Media Ventures' attention, it contended that the amendments to item 11 were made at the suggestion of Tradewinds International Inc., the Commission's auction contractor.

3. In the *Second Report and Order* outlining competitive bidding procedures, the Commission stated that applicants whose short form applications are substantially complete but contain minor errors or defects (*e.g.*, typographical errors) will be provided an opportunity to correct their applications prior to the auction.[6] The Commission noted, however, that applicants would not be permitted to make any major modifications[7] to their applications.[8] Major modifications, for example, include ownership changes and changes in the identification of parties to bidding consortia, as well as additions to the markets listed on the original application.

4. Further, in the July 20, 1994, Public Notice listing applications acceptable for filing, the Commission stated "[s]ome applicants whose applications have been accepted for filing have had their amendments rejected because they attempted to make impermissible amendments. Attempts to increase the number of markets for which they applied or to add new partners to existing partnerships, for example, were rejected. Such applicants can only bid in accordance with the terms of their original applications."[9] Thus, applicants had ample notice that the Commission would not allow modifications to add additional markets to the Form 175 after the original filing deadline.

5. For the foregoing reasons, we dismiss Media Ventures applications for the six licenses not listed on their original FCC Form 175.[10] Granting Media Ventures these six licenses would be unfair to those applicants that were prohibited from adding markets to item 11 after the original short form filing deadline. The Commission's Rules and Procedures do not permit modifications of this nature. It is imperative that this standard be applied equitably to all auction participants. However, under circumstances described above, we believe it would be unfair to subject Media Ventures to any penalty under our default rules. Therefore, we will dismiss the six applications as defective[11] without assessing a penalty.[12] These licenses will be reauctioned at a later date.

6. Accordingly, IT IS ORDERED, that Media Ventures' applications for MSA markets 185, 253, 289, 275, 292, and 176 ARE DISMISSED.

7. IT IS FURTHER ORDERED that no penalty will be accessed pursuant to 47 C.F.R. § 1.2104(g)(2) (1994).

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

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[1] In Item 11 of its original application, Media Ventures specified the following markets: St. Louis, MO-MSA 11; Alton-Granite City, IL-MSA 305; Ft. Pierce, FL-MSA 208; Lynchburg, VA-MSA 203; Davenport, IA-MSA 98; Champaign, IL-MSA 196; Decatur, IL-MSA 230; Peoria, IL-MSA 103; Bloomington, IL-MSA 250; La Crosse, WI-MSA 290; Rockford, IL-MSA 131; Columbia, MO-MSA 278; Kankakee, IL-MSA 273; Aurora, IL-MSA 303; Joliet, IL-MSA 304.

[2] *See* Letter from Clyde LaRue, Managing Director, Media Ventures to George Block, Tradewinds International, Inc. (July 12, 1994).

[3] In item 9 of Form 175 (Preference Type), Media Ventures checked the woman-owned small business block.

[4] The original due date was July 12, 1994, but was extended two days. *See* July 7, 1994 Public Notice.

[5] Media Ventures won licenses in the following markets not listed on its original application: Terre Haute, IN-MSA 185; Sioux City, IA-MSA 253; Rapid City, SD-MSA 289; St. Joseph, MO-MSA 275; Sherman-Denison, TX-MSA 292; Springfield, IL-MSA 176.

[6] *See Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 11 (1994) at ¶ ¶ 167-168.

[7] Changing the number of markets could impact mutual exclusivity and, thus, is considered a major modification.

[8] This information was reiterated in the May 1994, IVDS Information Packet, page 3; the IVDS Bidder's Information Package, page 4; and codified at 47 C.F.R. § 1.2105(b)(2) (1994).

[9] *See* Public Notice 43988 released July 20, 1994.

[10] *See* note 5, *supra*.

[11] *See* 47 C.F.R. § 1.958(c).

[12] Media Ventures' initial down payment for the six markets will be refunded under a separate cover.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-8**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8412 |
| Table of Allotments, | RM-8461 |
| FM Broadcast Stations. | |
| (Ola and Russellville, Arkansas)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 2, 1995; Released: August 10, 1995**

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 677 (1994), issued in response to a petition filed on behalf of Yell County Broadcasting ("petitioner") proposing the allotment of FM Channel 267A to Ola, Arkansas, as that community's first local aural transmission service. Petitioner filed supporting comments in response to the *Notice*. Johnson Communications, Inc. ("JCI"), licensee of Station KCJC(FM), Channel 265A, Russellville, Arkansas, filed a counterproposal,[2] to which petitioner responded. No other comments were received.

2. JCI counterproposed the substitution of Channel 267A for Channel 265A at Russellville, Arkansas, and modification of the license for Station KCJC(FM) accordingly. In support of the counterproposal, JCI states that the requested substitution would enable Station KCJC(FM) to improve its existing service significantly. JCI advises that although Station KCJC(FM) is presently licensed on Channel 265A with an effective radiated power of 6 kilowatts, its operation is governed by the contour protection provisions of Section 73.215 of the Commission's Rules. JCI advises that it is constrained from further service improvements by Stations KBBQ-FM, Fort Smith, Arkansas to the west, and KAWW-FM, Heber Springs, Arkansas, to the east, both of which operate on first adjacent Channel 264C2.[3] JCI advises that operation on Channel 267A from its proposed reference coordinates at 35-10-00 and 93-10-00 would enable it to provide a 70 dBu signal over Russellville, Dardenelle and Ola, Arkansas. Further, JCI states that by removing its channel adjacency to Stations KBBQ-FM and KAWW-FM, their service would also be improved by the requested substitution at Russellville.

3. Petitioner, in reply comments, opposes JCI's proposal as it would preclude the allotment of Channel 267A to Ola, Arkansas, an incorporated community. Petitioner argues that in accordance with the Commission's allotment priorities, its first local service proposal (priority three) is preferred over a proposal that would provide a service improvement of an existing station. Petitioner notes that a facility improvement in the allotment context is analyzed pursuant to priority four ("other public interest matters"), to determine the extent to which the proposed change will enable a station to provide service to an expanded population, citing *Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1989). In further support, petitioner states that although JCI claims that its proposed allotment plan will enable Station KCJC(FM), as well as two other area stations to provide improved services, JCI failed to supply any engineering data to support its assertion. Therefore, petitioner urges the denial of JCI's counterproposal.

4. The proposed allotment of Channel 267A at Ola, Arkansas, and JCI's requested use of that frequency at its specified site at Russellville, are located 17.4 kilometers (11 miles) apart, whereas a minimum distance of 115 kilometers (71 miles) is required in this instance. In an attempt to resolve the technical conflict, the staff performed a frequency spectrum search to determine if alternate channels may be available for allotment to either community. None was found to be available. Therefore, we must consider these proposals on a comparative basis. Pursuant to the Commission's FM allotment priorities, a first local service is usually preferred over a proposal to improve an existing facility.[4] Furthermore, JCI presented no evidence to demonstrate that its proposed facility would provide a greater public benefit, such as the provision of a first or second full-time aural service, than would result from providing Ola with its first local FM service. *See Belvidere, New Jersey, Scranton and Tannersville, Pennsylvania*, 6 FCC Rcd 1331 (1991). Therefore, we find that the provision of a first local aural transmission service at Ola must be preferred over the requested channel substitution at Russellville.

5. As stated in the *Notice*, Channel 267A can be allotted to Ola, Arkansas, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter therefor is sited at least 1.8 kilometers (1.1 miles) south of the community at coordinates 35-01-02 and 93-13-34. The site restriction is required to avoid a short spacing to Station KCJC(FM), Channel 265A, Russellville, Arkansas, at coordinates 35-17-37 and 93-10-39.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 25, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Ola, Arkansas, as follows:

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[1] The community of Russellville, Arkansas, has been added to the caption.

[2] Public Notice of the counterproposal was given on April 13, 1994, Report No. 2005.

[3] We note that JCI's licensed site at coordinates 35-17-37 and 93-10-39 is 0.7 kilometers (4 miles) short-spaced to Station KAWW-FM, Heber Springs, but meets the minimum distance separation requirements to Station KBBQ-FM, Fort Smith, Arkansas.

[4] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). *See also Benton, Arkansas, et al.*, 3 FCC Rcd 4840 (1988), *recon. denied*, 7 FCC Rcd 2555 (1992).

| City | Channel No. |
|---|---|
| Ola, Arkansas | 267A |

7. The window period for filing applications for Channel 267A at Ola, Arkansas, will open on **September 25, 1995** and close on **October 26, 1995**.

8. IT IS FURTHER ORDERED, That the counterproposal filed on behalf of Johnson Communications, Inc., requesting the substitution of Channel 267A for Channel 265A at Russellville, Arkansas (RM-8461) IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 267A at Ola, Arkansas, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Cablevision Systems Corporation — CUID No. OH1275 (Richfield)

Benchmark Filing to Support
Cable Programming Service Price

## MEMORANDUM OPINION AND ORDER

**Adopted: August 2, 1995; Released: August 10, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

United Artist Enterprises — CUID No. TN0085 (Shelbyville)

Benchmark Filing to Support
Cable Programming Service Price

## MEMORANDUM OPINION AND ORDER

**Adopted: August 2, 1995; Released: August 10, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

TELE-MEDIA COMPANY CSR-3896-A
FL0634

For Modification of the ADIs of
Television Broadcast Stations
WSCV and WLTV

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 25, 1995; Released August 11, 1995**

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. Tele-Media Company ["Tele-Media"], operator of a cable television system serving the community of Century Village East in Deerfield Beach, Florida, has filed the captioned petition for special relief seeking to delete the community of Century Village East from the "area of dominant influence" ["ADI"] of Television Broadcast Stations WSCV (Channel 51), Fort Lauderdale, Florida, and WLTV (Channel 23), Miami, Florida, both of which stations have as their market the Miami, Florida ADI. Tele-Media's petition is opposed by Telemundo of Florida, Inc. ["WSCV"], licensee of Television Broadcast Station WSCV, and by WLTV License Partnership, G.P. ["WLTV"], licensee of Station WLTV. Tele-Media has replied.

**BACKGROUND**

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[5] 47 U.S.C. §534(h)(1)(C)(ii).

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in *MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.,* when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

## MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. Century Village East is located within Deerfield Beach, Florida, which is in Broward County, Florida, within the Miami, Florida ADI, at the ADI's northeastern edge. The community is situated approximately 15 miles north of Fort Lauderdale and approximately 38 miles north of Miami.

9. Tele-Media states in support of its petition that the community it serves, Century Village East, "is a private retirement community, consisting entirely of a condominium complex of 8,508 units," whose residents are not served by the Spanish-language programming of WSCV and WLTV. Tele-Media notes that the two stations have never been carried on its system, nor do the stations provide coverage of or local service to the community, in view of the stations' Spanish-language formats.[11] Tele-Media asserts that it carries on its system other Miami ADI stations which do provide local news, sports and other coverage of events of interest to the community. Finally, Tele-Media notes that neither WSCV nor WLTV is significantly viewed in the community.[12]

10. In opposition to Tele-Media, WSCV argues that Tele-Media is merely attempting to avoid its mandatory signal carriage responsibilities. WSCV notes that Tele-Media does carry on its system other Miami ADI stations, as well as duplicative stations from the neighboring West Palm Beach-Fort Pierce-Vero Beach, Florida ADI, and has done so even prior to enactment of the mandatory signal carriage rules. This, argues WSCV, demonstrates that Tele-Media recognizes that Miami ADI stations do provide local service to Century Village East. WSCV states that it has provided coverage of 17 news stories specifically relating to Broward County--within which Century Village East is located---in the past five weeks alone, and cites several examples. WSCV further states that 34% of the Miami ADI

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[7] *Id.* at 2977 (emphasis in original).
[8] *MM Docket 92-259,* 8 FCC Rcd at 2977, 2977 n.139.
[9] 47 C.F.R. §76.59.
[10] *MM Docket 92-259,* 8 FCC Rcd at 2981.
[11] Tele-Media in addition submits form letters signed by Dr. Sam Gevirtz, President of the Condominium Owners Organization of Century Village East, Inc.; Al Brass, President of CVE Master Management Company; and Amadeo Trinchitella, Commissioner of Deerfield Beach, Florida, all of whom are residents of Century Village East, in which they state that WSCV and WLTV "are of the Spanish language and therefore are of no use to our residents."
[12] For an independent station to be deemed to be significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 2 percent (total week hours) and a net weekly circulation of at least 5 percent. 47 C.F.R. §76.5(i).

population is Hispanic, and that the Hispanic population of Broward County is 9.2%, while that of Deerfield Beach is 4.1%. Moreover, notes WSCV, the Hispanic population of Broward County increased by 196% between 1980 and 1992, and that of Deerfield Beach increased by 130% during the same period. That WSCV and WLTV may not be significantly viewed, WSCV argues, is not dispositive, given their Spanish-language format.

11. WLTV, in opposition to Tele-Media, argues that Tele-Media's petition singles out the only Spanish-language stations in the Miami ADI for deletion, contrary to Congress' intent that cable systems not practice such discrimination, and contrary to the public interest, citing *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010-3012 (1990), and *Castanada v. Partida*, 430 U.S. 482 (1977). Tele-Media in fact carries every other Miami licensee, states WLTV, as well as several duplicating signals. WLTV notes that Tele-Media provides no evidence concerning the number of Century Village East residents who speak Spanish--WLTV cites data from the Nielsen Cable On-Line Data Exchange that shows that 3.3% of Tele-Media's subscribers are Hispanic--and further notes that the station carries many programs of interest to area residents, including daily news programming, regularly-scheduled children's shows, and exclusive sports coverage of many events world-wide of interest to all viewers. That other Miami ADI licensees may provide coverage of events of interest to Century Village East is irrelevant to WLTV's own coverage, the station contends, nor are viewership surveys that do not account for the area's Hispanic population.

12. In reply, Tele-Media argues that WSCV and WLTV cater to a discrete audience, and are not similarly situated with English-language stations licensed to the same area. Tele-Media reiterates that it has never carried either station, and therefore is not discriminating between them. WSCV's area-wide data on Hispanic populations is irrelevant to the specific population of Century Village East, Tele-Media asserts, and states that the community's Hispanic population "is nominal at best," and that the community is "without a Spanish speaking population." While cultural diversity may be important, maintains Tele-Media, it should not be mandated in this instance, based upon the local needs and desires of Century Village East residents. Tele-Media claims that if its petition is denied, it will be forced to drop programming it currently provides, a result not intended by Congress in enacting the 1992 Cable Act.

## ANALYSIS AND DECISION

13. We shall deny Tele-Media's petition, which appears to be more a request for relief from the requirements of the mandatory signal carriage rules than a request for a change in the area of the markets involved. Tele-Media concedes that it carries other Miami ADI stations on its Century Village East system. Commission records also show that the cable system serving the remainder of Deerfield Beach surrounding Century Village East has carried WLTV for years, and that WSCV was originally carried on the Century Village East cable system when the system began operation in 1982. Congress has clearly stated that the provisions of the 1992 Cable Act permitting ADI modifications "is not intended to permit a cable system to discriminate among several stations licensed to the same community."[13] In the present case, Tele-Media is doing exactly this, carrying every other Miami ADI commercial non-specialty licensee. Nor has Tele-Media demonstrated that WSCV and WLTV do not provide local service to Tele-Media's subscribers. To the contrary, Century Village East is well within the predicted Grade A contours of both WSCV and WLTV and each station has demonstrated that it provides coverage of and local service to the community.

14. That this service may be in the Spanish language does not negate its relevance, especially given the population data submitted by WSCV and WLTV. Nor has it been shown that the stations' programming is of interest only to a Hispanic or Spanish-speaking population.[14] With regard to viewing patterns in the community, we have previously recognized that Spanish-language stations such as WSCV and WLTV, are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[15] We continue to believe, as we did then, that the fact that such stations attract limited audiences must be taken into account in determining the equities concerning such stations' rights to cable carriage.

15. In view of the foregoing, we find that grant of Tele-Media's petition would not "better effectuate the purposes" of §614.

## ORDER

16. Accordingly, IT IS ORDERED, pursuant to §614(h)(1)(C) of the Communications Act of 1934, as amended (47 U.S.C. §534(h)(1)(C)) and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition for special relief filed June 2, 1993 by Tele-Media Company IS DENIED. Telemundo of Florida, Inc. and WLTV License Partnership, G.P. shall notify Tele-Media Company in writing of theirs carriage and channel positions elections (§§76.56. 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Tele-Media shall come into compliance with the applicable rules within 60 days of such notification.

17. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

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[13] H.R. Rep. No. 102-68, 102d Cong., 2d Sess. 98 (1992).

[14] *See Service Electric Cable TV of New Jersey, Inc.*, 102 FCC 2d 404, 406 (1984).

[15] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976). Recent Arbitron data also show that both WSCV and WLTV have measurable off-air audiences in Broward County, and that WLTV achieves measurable viewership in cable homes as well. In noncable homes in Broward County, WSCV achieves a 1 share and a 5 net weekly circulation. WSCV has no recorded viewing in cable homes. WLTV achieves a 2 share and a 7 net weekly circulation in noncable homes, and between a 0 and a 0.5 share and a 3 net weekly circulation in cable homes. Arbitron, *Television County Coverage: Florida* (Cable Controlled Counties), 1993. We recognize that this data is county-wide data, and not community-specific data. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data is probative, although not conclusive, in cases of this type.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Gannon University Broadcasting, Inc. CSR-3922-C

Request for Declaratory Ruling

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 31, 1995; Released: August 11, 1995**

By the Deputy Chief, Cable Services Bureau:

1. In the above-captioned proceeding, Gannon University Broadcasting, Inc., licensee of television broadcast station WFXP[1] (channel 66), Erie, Pennsylvania, filed a petition for declaratory ruling requesting that the Commission declare its retransmission consent election valid with respect to Coaxial Cable TV Corporation's system serving Edinboro, Pennsylvania. An opposition and supplemental reply were filed on behalf of Coaxial Cable to which WFXP has replied.

2. In support of its request, WFXP states that on June 17, 1993, it prepared a letter to Coaxial Cable in which it stated that it was electing retransmission consent status, pursuant to §76.64(f)(1) of the Commission's Rules. On the same day it took this letter to the Gannon University Post Office, which is a fully-functioning post office authorized by the United States Postal Service, and requested that it be sent via registered mail pursuant to §76.64(h) of the rules.[2] WFXP states that at this point it assumed that its letter would be delivered as requested, but in actuality, post office personnel did not post the letter until June 18, 1993. Because of this one day delay, CoaxialCable subsequently informed WFXP that its retransmission consent election was untimely and it would therefore consider that the station had elected must carry status by default. WFXP argues that §76.64(f)(1), which requires that election be made by a particular date, and §76.64(h), which requires notice by certified mail are two separate requirements and it maintains that while subsection (f)(1) imposes a default restriction, subsection (h) does not. Indeed, WFXP avers that Coaxial's receipt of its notice within 48 hours is well within the three days considered reasonable when legal documents must be delivered by U.S. Mail.[3] WFXP states further that in any event Coaxial Cable had constructive notice of its intention due to a June 17, 1993 article in the local paper affiliated with the Edinboro cable system. Finally, WFXP points out that Coaxial Cable itself violated §76.58(e) of the Rules in failing to inform WFXP by June 2, 1993 of its system's channel line-up and WFXP's current channel position on the system, a failure which has yet to be corrected.

3. Coaxial's opposition maintains its position that WFXP's retransmission consent notification was untimely pursuant to Commission's Rules. It argues that not only has WFXP failed to provide a copy of a certified receipt bearing the date of June 17, 1993, indicating its request was timely presented to the post office, but it has failed to produce a certified receipt at all. Such a lack, states Coaxial, would reflect WFXP's further lack of compliance of the Commission's notification procedures. Moreover, Coaxial avers that WFXP's attempt to shift the blame for the delay to the University Post Office is illogical in view of the fact that this post office is a branch of the University itself. Finally, Coaxial states that an article in the local paper is wholly irrelevant to the issue at hand and no substitute for compliance with §76.64 of the Commission's rules.

4. In reply WFXP states that Coaxial's position that the June 18th postmark on WFXP's registered receipt[4] overrides WFXP's June 17th election notice is the harshest possible construction of §76.64 and is a position which is not required by either the rule itself or the 1992 Cable Act. Section 76.64 states that the election must have been made and "sent" by June 17, 1993, not "postmarked". WFXP points out that Coaxial does not dispute that WFXP did indeed deliver or "send" its notice to the post office on June 17, 1993. Therefore, it maintains, its notice was timely. Further, WFXP argues that although Gannon University is its parent corporation, it is in no way associated with the Gannon University Post Office and has no control over its day-to-day operations. Finally, WFXP concludes that grant of Coaxial's position would not be equitable given the system's own lax compliance with the Commission's notice requirements.

5. Coaxial's supplemental reply points to the fact that a footnote in WFXP's reply concedes that the Gannon University Post Office is not an agent of the U.S. Postal Service as previously represented, but holds only a bulk mail permit and cannot post certified mail. As a result, states Coaxial, WFXP's notification could have only been processed by a postage meter at the University prior to being forwarded to a regular U.S. postal facility.[5] Indeed, Coaxial argues, the envelope containing the retransmission consent notification sent to Coaxial bears a cancelled postage meter stamp from Gannon University Station which is dated June 18, 1993. Coaxial maintains that this fact, combined with WFXP's continuing refusal to produce a certified receipt with a date prior to June 18th, raises serious doubts about WFXP's candor throughout this process. Moreover, it also raises doubts about the declaration provided by the Gannon post office personnel which also represented its facility as an authorized postal agent.

6. WFXP's states in reply that it made a full, prompt and voluntary disclosure of the true nature of the Gannon University postal office as soon as it was discovered. It argues, therefore, that Coaxial's attempt to characterize

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[1] Prior to March 6, 1995, WFXP's call letters were WETG.

[2] WFXP submits the declarations of Anthony J. Miceli (WFXP's General Manager, Susan Grippe (a WFXP employee) and Doris Carniewski of the Gannon University Post Office, which all state that the retransmission consent notice was delivered and accepted for mailing on June 17, 1993.

[3] *See* 47 C.F.R. §1.4(h); Fed. R. Civ. P. 6(e).

[4] WFXP provides a copy of this receipt with its reply.

[5] WFXP's notification was apparently mailed from a post office located in Erie, Pennsylvania.

WFXP as less than truthful over this issue is merely a delaying tactic and an attempt to divert the focal point of this proceeding to something totally irrelevant. In any event, as it has stated previously, WFXP maintains that certified receipts simply have no connection to the question of compliance with regard to a retransmission consent election notification.

7. We do not agree with the arguments raised by WFXP and conclude that WFXP has erred in its interpretation of the intent of §76.64 of the rules. While subsection (f)(1) of that rule states only that retransmission consent election must be made by June 17, 1993, subsection (h) specifically states that "*on or before each must-carry/retransmission consent election deadline,* each television broadcast station. . . *shall send via certified mail* . . . a copy of the station's election statement . . . . (emphasis supplied)" We consider these two subsections to be part of a whole whose intent is that a retransmission consent election notification must be postmarked no later than midnight of each retransmission consent election period. While we can concede from the evidence that it was apparently WFXP's intention to request retransmission consent status rather than must-carry status in this instance, the fact of the matter is that its notification was mailed beyond the deadline mandated by the rules. Given the large number of broadcasters and cable operators involved, the Commission recognized the potential for confusion and dispute surrounding the initial must-carry/retransmission consent election. Thus the rules and process for making the election, including in particular the requirement that such notifications be sent by a date certain via certified mail, were specifically designed to provide certainty and avoid embroiling the Commission in disputes of this type.[6] Moreover, while we note Coaxial's apparent failure to file its June 2, 1993, notification, nowhere does WFXP allege that Coaxial's failure to do so affected its ability to submit its retransmission consent election notice in a timely manner. As a result, we cannot conclude that WFXP made a timely retransmission consent election for the June 17, 1993 deadline.

8. In light of the above, therefore, the complaint filed on behalf of Gannon University Broadcasting, Inc. (CSR-3922-C) IS DENIED.

9. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[6] The Commission has stated previously in other contexts, that it would adhere strictly to the standard that applicants seeking waivers of Commission filing deadlines demonstrate unusual or compelling circumstances for the waiver requests. Public Notice (FCC 85-534), 58 RR 2d 1706 (1985) overruling *Caldwell Television Associates, Ltd.*, 53 RR 2d 1686 (1983).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Cypress Broadcasting Corporation CSR-4463
Santa Cruz, California

For Waiver of §76.92(f) of the
Commission's Rules

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 31, 1995; Released: August 11, 1995**

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. Cypress Broadcasting Inc., licensee of Television Broadcast Station KCBA (Fox, Channel 35), Salinas, California has filed the captioned "Petition For Waiver of §76.92(g) of the Commission's Rules." This petition seeks a waiver of the Commision's significantly viewed exemption to the network nonduplication rules. The petition is unopposed.

**PETITIONER'S ARGUMENT**

2. Upon the request of a local station which has the exclusive rights to distribute a network program, a cable operator may not carry a duplicating network program broadcast by a distant station.[1] However, an otherwise distant station is exempt from the application of the network nonduplication rules if it is considered significantly viewed in a relevant community.[2] KCBA seeks a waiver of the significantly viewed exemption of the Commission's network nonduplication rules so it may assert network nonduplication protection against television broadcast station KTVU (Fox, Channel 2), Oakland, California, which is currently considered significantly viewed in the communities served by TCI Cablevision surrounding Santa Cruz, California (TCI).

3. KCBA argues that during the past two years KTVU has not met the Commission's standard to be considered significantly viewed in the relevant communities.[3] KCBA maintains that it is operating at a competitive disadvantage because it cannot assert its network nonduplication rights against KTVU, which is also a Fox affiliate, so long as it maintains its significantly viewed status. KCBA claims that it has satisfactorily demonstrated that KTVU has not been significantly viewed in the communities at issue for the last two years. Accordingly, it asks that its waiver petition be granted and that it be allowed to assert its network nonduplication rights against KTVU on TCI's cable system.

4. In *KCST-TV, Inc.*,[4] the Commission held that in order to obtain a waiver of §76.92(f) of the Commission's Rules, which provides for an exemption to the network nonduplication rules for significantly viewed stations, petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community, or system specific, noncable viewing data, to one standard error. For each year, the data must be obtained as a result of independent professional surveys taken during two one-week periods which are distributed proportionately between the relevant cable communities, and which are also separated by at least thirty days; not more than one of the surveys may be taken between April and September of each year.[5]

5. Consistent with the above, and in support of its contention that KTVU is no longer significantly viewed in the communities at issue, KCBA submits viewing data from the cable communities during four one-week surveys of noncable households, which were conducted by VideoProbe Index, during the weeks of June 23-29 and September 15-21, 1993, and June 22-28 and September 14-20, 1994. According to these surveys, in 1993, KTVU's net weekly circulation was 5.9% (with a standard error of +/- 2.6%), and its share was 1.0% (with a standard error of +/- 0.8%); in 1994, KTVU's net weekly circulation was 6.3% (with a standard error of +/- 3.5%) and its share was 0.4%.[6] Adjusting by the standard error, therefore, KCBA concludes that KTVU failed to meet the Commission's standard for a significantly viewed independent station in the communities noted either in 1993 or in 1994. According to KCBA, the viewing data clearly demonstrates that during the past two years, KTVU has been unable to attract the proportion of noncable viewers necessary to be regarded as significantly viewed by the Commission in the communities listed, pursuant to §76.5(i) of the Commission's Rules.

6. KCBA also notes that in 1994 alone it aired 630 local stories about Santa Cruz, where it has two full-time news employees, and where it also provides daily live news coverage and maintains a business office and studio. KCBA adds that during recent flooding in Santa Cruz County, it supplied video footage to the Fox Broadcasting Network, which was utilized in its newscasts, and that the network relies on KCBA to cover local Santa Cruz stories of national or regional interest. Finally, KCBA states that it is an active and responsible corporate citizen of the Santa Cruz area, and that it frequently broadcasts area public service announcements, as well as providing promotional sponsorship for many Santa Cruz events, including the

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[1] *See*, 47 CFR §76.92.

[2] The Commission considers an independent station, such as KTVU, to be significantly viewed in a particular area when it has a share of noncable viewing hours of at least 2% (total week hours), and a net weekly circulation of at least 5%. 47 CFR §76.5(i).

[3] The subject communities are as follow: Santa Cruz; Scott's Valley; and unincorporated ares of Santa Cruz County including the following communities: Aptos, Ben Lemond, Bonny Dune, Boulder Creek, Brookdale, Davenport, Felton, La Selva Beach, Live Oak, Lompico, Mt. Herman, Rio Del Mar, Soquel,and Zayante, California.

[4] 103 FCC 2d 407 (1986).

[5] *See*, 47 CFR §76.54(b).

[6] The petitioner claims that the standard error for this share is "statistically insignificant" and denotes this with the symbol "#" in its study.

parks, the local fair, Big Brothers/Big Sisters, band concerts, bike races, and the Chamber of Commerce Trade Fair.

## DISCUSSION

7. We find that the survey data submitted by KCBA, including the test dates, meet both the criteria provided in the Commission's rules and the evidentiary standards explained in *KCST-TV, Inc., supra.* Moreover, s ince combined surveys were taken for the communities served by TCI-Santa Cruz, the rules require that each community be proportionally represented on the basis of its relative population in the sample, which petitioner has also done. During the first year, 1993, the surveys were taken during the weeks of June 23-29 and September 15-21. In the second year, 1994, the surveys were taken during the weeks of June 22-28 and September 14-20. The 1993 data showed that KTVU had an average 1.0% share of total weekly viewing hours and an average 5.9% net weekly circulation share in the noncable homes in the relevant cable communities. In 1994, the data submitted showed that KTVU had an average share of 0.4% of total weekly viewing hours and an average 6.3% net weekly circulation. Because the reported total weekly viewing shares noted above do not reach the required two percent viewing level, we find that KTVU is not significantly viewed in the relevant cable communities, and we need not consider the standard error or the net weekly circulation calculations in this instance. Again, KTVU failed to achieve the Commission's minimum standard of a 2% share and a 5% net weekly circulation to qualify as significantly viewed, pursuant to §76.5(i) of the Rules.

## ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, That the petition (CSR-4463), filed February 2, 1995, by Cypress Broadcasting, Inc. IS GRANTED.

9. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

UPCHURCH BROADCASTING, INC. CSR-4486-M
Baxley, Georgia GA0108

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 26, 1995; Released: August 11, 1995**

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. Upchurch Broadcasting, Inc. ("UBI"), licensee of WUBI(TV) (Ind., Channel 34), Baxley, Georgia, filed a complaint claiming that Northland Communications Corporation ("Northland"), operator of cable television systems serving Statesboro, Georgia had declined to carry the station, even though the station is a qualified local commercial television station within the meaning of §76.55(b) of the Commission's Rules and §614(b) and (h)(1) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] Northland filed an opposition to the complaint in the form of three letters dated March 21, March 24, and March 27, 1995. On April 3, 1995, WUBI filed a reply to Northland's opposition letters. On April 10 and April 24, 1995, Northland responded by letter to WUBI's reply.

2. Baxley, Georgia, WUBI's city of license, is in Appling County in the Savannah, Georgia area of dominant influence ("ADI"). Northland's Statesboro cable system is located in Bullock County, which is also in the Savannah ADI.

**SUMMARY OF PLEADINGS**

3. WUBI asserts that it is a qualified local commercial television station entitled to carriage on Northland's Statesboro cable system under 47 C.F.R. §76.56(b). WUBI argues that Northland's Statesboro system has more than 12 usable activated channels and must, therefore, provide carriage for qualified local commercial television stations on up to one-third of its capacity. Furthermore, WUBI contends that it complied with the notice provisions specified by the Commission rules, but that Northland has failed to commence carriage of WUBI's signal.

4. According to petitioner, on May 2, 1993, Northland notified WUBI that it did not qualify for must-carry status on its Statesboro system because the station's signal did not meet the signal strength requirements set forth in the Commission's rules, and because WUBI would be considered a "distant" signal pursuant to Section 111 of the Copyright Act, which would subject the cable system to additional copyright liability. WUBI argues that it responded to Northland stating that it was willing to provide the equipment necessary for the system to receive WUBI's signal and that it would also discuss reimbursement of additional copyright liability.

5. WUBI contends that it reasserted its must-carry rights on two additional occasions, and that pursuant to the Satellite Home Viewer Act, Northland would no longer be liable for additional copyright costs due to carriage of the station. Furthermore, WUBI argues that signal quality test performed on January 23, 1995, with witnesses from both parties present, show that the station's signal strength is -30 dBm at the Statesboro headend. Accordingly, WUBI maintains that no issues remain which prevent the operator from carrying the station. Finally, WUBI details the negotiations between the parties in an attempt to reach an agreement regarding carriage, noting that rather than directly deny carriage, on March 9, 1995, Northland notified WUBI that it intended to relocate its headend and tower and that it did not believe that WUBI could provide an adequate signal to the new tower.

6. In a series of three letters comprising Northland's opposition to WUBI's complaint, Northland asserts the WUBI made several errors in its filing. First, Northland disputes certain facts in the affidavit of Lydia Syed, general manager for UBI, including the statements that Northland had no intention of carrying WUBI over the Statesboro system, and that Northland never responded to the station's request for carriage. Northland also claims to the contrary that it stated it would carry WUBI if forced to do so, and that on February 25,1995 it respond to WUBI's request for carriage. In addition, Northland alleges that WUBI has failed to comply with Commission's must-carry rules which require the signal to be delivered to the system's designated principal headend at the input terminals of the signal processing equipment. This is so, Northland argues, because WUBI has "only mounted an antenna on Northland's tower with no downlead or preamp." Finally, Northland admits that "[w]hile [it] no longer questions[s] that WUBI can meet the minimum signal requirements..." it questions how a reading of -30 dBm could be achieved with the problem with the stations' downlead, as admitted in the letter from Ms. Syed to WUBI confirming receipt of Northland's February 28, 1995 letter.

7. On April 3, 1995, WUBI filed a reply to Northland's response. WUBI states that it is currently negotiating with Northland regarding a possible start-up date for the station. WUBI also replies that Northland's response is procedurally defective because it is not supported by an affidavit or declaration. In addition, WUBI explains that Ms. Syed was not aware that Northland's response to the station's request for carriage had been omitted from the complaint. WUBI maintains that there was no motivation for failing to include the response because it merely reiterated the must-carry rules and did not provide "genuine" reasons for refusing carriage.

8. Again in the form of two letters filed with the Commission on April 11, and May 15, 1995, respectively, Northland responds to WUBI's reply. Northland claims that the carriage negotiations have "come to an end," and that it expects that the Commission will resolve the outstanding issues. In addition, Northland offers a "history of negotiations" stating that this history has led it to "take the

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

position of making sure that the signal will be available to the input of our receiving equipment before notifying the subscribers that the station will be added to the line-up."[2]

## DISCUSSION

9. We disagree with Northland's contention that it is not in violation of the must-carry rules by refusing to carry WUBI on its Statesboro system. Northland admits in its March 24, 1995 letter in opposition to the must-carry complaint that WUBI can meet the minimum signal quality requirements. It is undisputed that WUBI is a qualified local commercial television station entitled to be carried on Northland's Statesboro system under 47 C.F.R. §76.56(b). Furthermore, it is undisputed that Northland's Statesboro system has more than 12 usable activated channels,[3] and is, therefore, required to carry local commercial television stations on up to one-third of the usable activated channels of the system.[4] Accordingly, the remaining issue before us is whether Northland is obligated to grant WUBI carriage on its Statesboro system, or whether WUBI must first provide the necessary equipment for delivery of a good quality signal to the system headend.[5]

10. One exception to the carriage requirement is that a cable operator need not afford must-carry status to an otherwise qualified local commercial television station if the station fails to provide a good quality signal to the system's principle headend. We find that WUBI has satisfied the criteria for carriage by committing to install the equipment necessary to deliver a good quality signal to the Statesboro headend. Under the 1992 Cable Act, a station need only "agree to be responsible for the costs of delivering to the cable system a signal of good quality."[6] In this instance, WUBI has agreed to be responsible for installing all specialized equipment necessary to deliver a good quality signal to the Statesboro headend. Northland cannot, therefore, deny the station carriage on the ground that the Commission's signal quality standards have not been met.[7]

## ORDER

11. Accordingly, the petition filed on March 17, 1995 by Upchurch Broadcasting, Inc. IS GRANTED in accordance with Section 615(j)(3) (47 U.S.C. § 535) of the Communications Act of 1934, as amended. Northland Communications Corporation IS ORDERED to commence carriage of WUBI sixty (60) days from the date WUBI provides the necessary specialized equipment to receive a good quality signal at Northland's Statesboro headend.

12. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[2] Northland also asserts that the Savannah ADI should be modified. However, this assertion was not separately filed as a petition for special relief and is not supported by any evidence. Accordingly we will treat the assertion only as additional argument, not as a petition for ADI modification.

[3] According to the Form 325 filed by Northland in July 1994, based on information from December 1993 Northland's Statesboro system has 34 channels.

[4] 47 U.S.C. § 534 (h)(1)(B)(ii) and (iii); 47 C.F.R. § 76.56(b)(2).

[5] As stated in paragraph 5, *supra*, the issue raised by the petitioner regarding WUBI's copyright license liability has been resolved with the passage of the Satellite Home Viewer Act of 1994, which amended Section 111(f) of title 17, United States Code. Under this Act, a station located within the same ADI as a cable system is no longer considered a "distant signal" on that system for purposes of compulsory copyright license liability and, therefore, is not subject to the additional copyright fees attendant to "distant signal" carriage within the market. Applying the Act to the facts of this proceeding, WUBI is not considered a "distant signal" if carried on cable systems located in the Savannah ADI and, therefore, would not face additional copyright fees if carried on Northland's Statesboro system.

Furthermore, we do not believe, as alleged by Northland, that Lydia Syed, on behalf of WUBI, intentionally or deliberately misrepresented facts to the Commission in her affidavit in support of WUBI's must-carry complaint. Accordingly, we reject Northland's claims of perjury.

[6] 47 U.S.C. § 534(h)(1)(B)(iii).

[7] We expect that Northland will cooperate with WUBI's steps to provide a good quality signal.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Petition of Time Warner Cable CSR-4194-A

For Modification of the ADI of
Station WTMW-TV, Arlington, VA

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 28, 1995; Released: August 11, 1995**

By the Cable Services Bureau:

**INTRODUCTION**

1. Before the Commission is a petition filed by Time Warner Cable ("Time Warner" or "operator") seeking to modify the Washington, D.C. "area of dominant influence" ("ADI") and to exclude 12 communities served by Time Warner in Pennsylvania and West Virginia[1] from the television market of station WTMW-TV's (Channel 14, Arlington, VA) for purposes of the cable television mandatory broadcast signal carriage rules. This petition is unopposed.[2]

**BACKGROUND**

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[3] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[4] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[5] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market con-

[1] The particular communities affected by this petition include Chambersburg (PA0222); Greene Township (PA1555); Guilford Township (PA1556); Hamilton Township (PA1530); Letterkenny Township (PA2276); Newville (PA2574); Shippensburg (PA2575); Southhampton Township (PA2576 and PA2577); St. Thomas Township (PA1001); West Pennsboro Township (PA2578) and Martinsburg (WV0075) (collectively known as the "communities").

[2] Counsel for Urban Broadcasting Company, licensee of television station WTMW-TV, notified the Commission by letter dated July 7, 1994, that it planned to file an opposition to the petition along with a motion for leave to file. However, no opposition was ever received.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[5] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[6] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

sistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. As for deletions of communities from a station's ADI, the legislative history of this provision indicates that:

The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television mar ket.[8]

6. The Commission provided the following guidance in the *Report and Order* to aid decisionmaking in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[9]

7. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[10] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[11]

8. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[12] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

## MARKET FACTS AND ARGUMENTS OF THE PARTIES

9. In its petition, Time Warner requests that "WTMW's ADI market be modified so as to relieve [it] from any obligation to carry this station on its Martinsburg, WV or Chambersburg, PA systems."[13] Time Warner believes that its petition should be granted because the station fails to present programming that meets the local needs and interests of the viewers in the named communities. In addition, mandatory carriage of the station will force the operator to make "consumer unfriendly changes" by dropping a current service.

10. Time Warner also states that both the systems and the station are located in the Washington, D.C. ADI. Time Warner maintains that on August 13, 1993, Urban re-

[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[8] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).
[9] 8 FCC Rcd at 2977 (emphasis in original).
[10] *Id.* and n.139.
[11] 47 C.F.R. §76.59.
[12] 8 FCC Rcd at 2981.

[13] Time Warner notes that its Martinsburg system is located in Berkeley County, WV and its Chambersburg system is located in Franklin County, PA.

quested must-carry status for WTMW-TV on the Chambersburg and Martinsburg systems. The operator responded to the request by asking for assurances that WTMW-TV would provide indemnification for any increased copyright liability and stated that it would carry the station once the station agreed to indemnify.[14] The station agreed to provide indemnification for both systems by letters dated October 14, 1993.

11. To support its petition, Time Warner asserts that WTMW-TV fails to satisfy any of the four market factors set forth in the 1992 Cable Act and the Commission's rules. With regard to the historical carriage factor, the operator asserts that WTMW-TV has never been carried on the systems nor is it carried on any other cable system in the Martinsburg, WV or Chambersburg, PA vicinity. Time Warner adds that removing the communities from the station's ADI would be consistent with Congressional intent because there would be no disruption in established viewing patterns.

12. Petitioner alleges that the station also fails the local service element of the market modification test. Time Warner first asserts that WTMW-TV cannot be considered geographically proximate to the relevant communities. The operator states that Arlington, VA, WTMW-TV's city of license, is more than 60 miles from Martinsburg and more than 78 miles from Chambersburg. Moreover, both Martinsburg and Chambersburg lie entirely outside the station's Grade B contour. According to Time Warner, WTMW-TV also does not provide local service because it broadcasts home shopping programming that is almost exclusively without any focus on interests and issues involving Chambersburg or Martinsburg.[15] Time Warner suggests that WTMW-TV does not engage in any efforts to promote non-home shopping programming which it may broadcast.

13. Referring to the third factor, Time Warner states that several area stations, including WYVN (Ch. 60 - FOX, Martinsburg, WV), WHAG (Ch. 25 - NBC, Hagerstown, MD), and WJAL (Ch. 68 - Ind., Hagerstown, MD) provide extensive local programming throughout each day. The operator then states that the addition of WTMW-TV to its channel line-ups will not add to these local programming choices to any measurable degree. Finally, the operator alleges that WTMW-TV has insignificant viewing in the area because the station has never been carried on the systems and the station's Grade B signal fails to reach Martinsburg or Chambersburg.

## ANALYSIS AND DECISION

14. We will grant Time Warner's request. Based on the geographyand the statutory factors, we believe that the Chambersburg and Martinsburg communities are sufficiently removed from WTMW-TV that they ought not be deemed part of the station's market for mandatory carriage purposes.[16] The evidence before us, which has not been disputed, distinguishes these communities from the rest of the Washington, D.C. television market and persuades us that the action requested would "better effectuate purposes" of Section 614 of the 1992 Cable Act.

15. At the outset, the evidence suggests that WTMW-TV does not provide local service to the communities in question. WTMW-TV's does not place either a Grade A or Grade B contour over the cable communities.[17] It also has no reported audience in the counties where the cable communities are located and it has no history of cable carriage. Moreover, Arlington, VA, WTMW-TV's city of license, is more than 60 miles from Martinsburg and more than 78 miles from Chambersburg. The distance and terrain involved attenuates the local ties the station might have to the cable communities and helps explain why the station's viewership is too low to be reported.

16. We also believe that Time Warner's carriage of other local television stations provides support for the action requested. We recognize that Congress did not intend the third statutory criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue.[18] However, we believe this case is exemplary in that there are several television stations licensed within and around the Hagerstown, MD, ADI which have a closer nexus to the cable communities and provide more focused local programming than WTMW-TV. It is important to note that, one such station, WYVN, stands out because it is licensed to serve Martinsburg, West Virginia. WJAL, in addition, is closely identified with Chambersburg as its business office is located within that community.[19] These market facts, coupled with the distance between the cable communities and WTMW-TV, supports Time Warner's argument under the third factor.[20]

17. Time Warner also demonstrates that WTMW-TV has no historical carriage on the cable systems in question and has no audience in the counties in which the cable systems are located. Because WTMW-TV is both a relatively new station and one with a specialized format, these facts are not proper indicators, in and of themselves, of the relationship between the cable communities and the market of the television station nor should their absence permit a cable operator to undermine the objectives of the mandatory carriage requirement.[21] Here, however, we conclude that the lack of historical carriage and the dearth of audience is

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[14] *See* Letter to Theodore M. White, Urban Broadcasting Corporation, from Samuel K. Schultz, Jr., General Manager, Time Warner Cable (dated September 28, 1993)(attached as an exhibit to Time Warner's petition for special relief).

[15] Time Warner states that WTMW-TV airs Home Shopping Club programming for 22 hours per day Monday through Saturday and 20 hours every Sunday.

[16] H.R. Rep. 102-628, at 97-98.

[17] We have held that the local service requirement is satisfied if the station's Grade B contour covers the community. *See* 8 FCC Rcd at 2981.

[18] *See id.*

[19] We note that WYVN, WHAG, and WJAL, all place at least a Grade A contour over the cable communities. Both communities are less than twenty miles away from Hagerstown compared to Arlington which is at least 60 miles from either Martinsburg or Chambersburg. Audience data reflect this proximity. For example, Hagerstown television station WHAG garners an 8 share and a 50 net weekly circulation in Franklin County, PA, and an 8 share and 37 net weekly circulation in Berkeley County, W. VA.

[20] We note that Hagerstown is geographically "sandwiched" between Franklin County, PA, Chambersburg's home county, and Berkeley County, W. VA, Martinsburg's home county.

[21] *See, e.g., Time Warner Cable of Houston, Texas* (CSR-4108-A) (adopted: June 8, 1995).

of evidential significance when linked with other information regarding the market and the particular geography involved.

18. This is not a situation where the carriage pattern suggests that a station is logically part of the market for carriage purposes but has not been carried for competitive or content reasons. Nor do we believe that the operator has impermissibly singled out WTMW-TV from among other similarly situated stations as the sole station it has declined to carry. According to the channel line-up cards included with its filing, the Time Warner system in Chambersburg carries 12 broadcast signals (not including "superstation" WTBS), only 5 of which are from Washington, D.C. and the rest of which are from Hagerstown, MD, Harrisburg, PA, Lancaster, PA, and Baltimore, MD. Likewise, although several stations from Washington, D.C. have substantial over-the-air audiences in Franklin County, PA, so do stations from other markets. Moreover, several Washington, D.C. stations reflect minimal amounts of over-the-air audience in the county. The channel line-up card for the system in Martinsburg indicates that 12 broadcast signals (not including "superstation" WTBS) are carried, only 5 of which are from Washington, D.C. and the rest of which are from Martinsburg, WV, Hagerstown, MD, and Baltimore, MD. Although several stations from Washington, D.C. have substantial over-the-air audiences in Berkeley County, West Virginia, so do stations from other markets and several Washington, D.C. stations reflect no or a minimal amount of over-the-air audience in the county.[22] Finally, we note that no other area cable system is carrying WTMW-TV's signal. In these circumstances, we cannot discount WTMW-TV's carriage and audience as indicators of the scope its market area.

19. Given these facts, the operator's deletion petition appears to be a legitimate request to redraw ADI boundaries to make them congruous with market realities.

## ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(h), and Section 76.59 of the Commission's Rules, 47 C.F.R. § 76.59, that the "Petition for Special Relief" (CSR-4194-A) filed January 12, 1994, by Time Warner Cable IS GRANTED.

21. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[22] *See* Arbitron's Television County Coverage for 1993. These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Great Trails Broadcasting Corp. CSR-3826-A
Hagerstown, Maryland

For Modification of Station
WHAG-TV's ADI

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 28, 1995; Released: August 11, 1995**

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. Great Trails Broadcasting Corporation ("WHAG-TV"), licensee of television station WHAG-TV (NBC, channel 25), Hagerstown, Maryland, has filed the captioned petition for special relief seeking to include communities located in the following ten counties within the Hagerstown, Maryland "area of dominant influence" ("ADI") for purposes of the cable television mandatory broadcast signal carriage rules: Frederick, Allegany, and Garrett Counties in Maryland; Franklin and Fulton Counties in Pennsylvania; Berkeley, Jefferson, Morgan, and Hampshire Counties in West Virginia; and Frederick County in Virginia.[1] WHAG-TV's ADI currently consists of a single county, Washington County, Maryland. The communities that WHAG-TV seeks to have added to its ADI are served by a number of different cable systems and are part of the following three ADIs: Washington, D.C.; Pittsburgh, Pennsylvania; and Johnstown-Altoona, Pennsylvania.[2] Central Virginia Cable, Inc. ("CVC") and Time Warner Cable ("Time Warner") have filed oppositions to WHAG-TV's petition. WHAG-TV has filed comments in reply to these oppositions. In addition, television station WRC-TV (NBC, channel 4), Washington, D.C. ("WRC"), has filed an Informal Objection, opposing the grant of WHAG-TV's petition with respect to communities included in the eight counties that are part of the Washington, D.C. ADI. WHAG-TV has filed an opposition to WRC's Informal Objection.[3]

**BACKGROUND**

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[4] and implementing rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[5] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[6] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[7]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as –

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[1] *See* Appendix A for a list of the communities at issue in this proceeding (the "Communities"). WHAG-TV has also asked the Commission to refund its filing fee of $790.00. WHAG-TV contends that petitions requesting significantly viewed status were not subject to a fee and that ADI modification petitions should be treated similarly. This matter has been referred to the Managing Director's Office for appropriate action.

[2] *See* Appendices A and B.

[3] In its opposition, WHAG-TV argues, among other things, that WRC's Informal Objection should be dismissed as untimely. WHAG-TV states that it filed its petition for special relief on May 10, 1993 and served WRC with that petition. WHAG-TV asserts that the Commission placed the petition on public notice on June 11, 1993 and specified that comments were to be filed by July 1, 1993, and reply comments were to be filed by July 14, 1993. WHAG-TV contends that according to 47 C.F.R. §76.7(d), comments on petitions for special relief must be filed within 20 days of the date of public notice. Under these circumstances, WRC's pleading would have been due on July 1, 1993. WRC's Informal Objection is dated August 31, 1993. We will accept WRC's comments in the interest of developing a complete record in this matter.

[4] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] 8 FCC Rcd 2965, 2976-2977 (1993).

[6] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[7] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[8]

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[9]

5. The Commission provided guidance in its *Report and Order in MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[10]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[11] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[12]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[13] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.,* when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

## MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities at issue in this proceeding are located in ten counties covering four states and comprising three ADIs.[14] WHAG-TV's ADI of Hagerstown, Maryland consists solely of Washington County. In its petition,

[8] Communications Act of 1934, as amended, §614(h)(1)(C)(ii), 47 U.S.C. §534(h)(l)(C)(ii).

[9] H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

[10] *Id.* at 2977 (emphasis in original).

[11] 8 FCC Rcd at 2977, n.139. Viewership data cited herein is from Arbitron, *Television County Coverage* reports. This data is county data, rather than community-specific data. However, absent evidence that such data is not fairly reflective of viewing in the actual communities in question, we accept such data as probative in cases of this type.

[12] 47 C.F.R. §76.59.

[13] 8 FCC Rcd at 2981.

[14] *See* Appendices A and B.

WHAG-TV asks the Commission to modify its ADI so that the communities referenced in Appendix A may also be included in the Hagerstown, Maryland ADI for purposes of the cable television mandatory broadcast signal carriage rules. The counties containing the communities here in question are contiguous to the Hagerstown, Maryland ADI, with the exception of Garrett County, Maryland; Hampshire County, West Virginia; and Frederick County, Virginia, which lie to the west and southwest of the Hagerstown ADI.

9. WHAG-TV asserts that it satisfies each of the four market modification criteria set forth in the 1992 Cable Act and the Commission's rules. With respect to the historical carriage factor, WHAG-TV identifies those cable systems serving each of the ten counties, which do not also serve portions of Washington County, and states that it has been carried on most of the systems since at least 1972, and on some of the systems since 1977 or 1984.[15]

10. WHAG-TV maintains that it provides coverage to most of the Communities served by the relevant systems. WHAG-TV submits a contour map showing that it places a Grade B contour over virtually all of the Communities and a Grade A or City Grade contour over many of the Communities or portions thereof. Specifically, the petitioner indicates that its Grade B contour entirely covers the following seven counties: Frederick, Maryland; Franklin, Pennsylvania; Fulton, Pennsylvania; Berkeley, West Virginia; Jefferson, West Virginia; Morgan, West Virginia; and Frederick, Virginia. The petitioner explains that it places a Grade B contour over virtually all of Hampshire County, West Virginia, including Romney, the largest city in Hampshire County, and over all of Allegany County, Maryland, but for a small tip in the westernmost corner.[16] The only county included in its request over which WHAG-TV does not provide any Grade B contour coverage is Garrett County, Maryland.[17] The petitioner states that it places a Grade A contour or City Grade over four counties--Fulton, Pennsylvania; Berkeley, West Virginia; Jefferson, West Virginia; and Morgan, West Virginia. WHAG-TV also indicates that it places a Grade A contour or City Grade over at least some portion of three other counties--Frederick, Maryland; Franklin, Pennsylvania; and Frederick, Virginia.

11. In addition, WHAG-TV avers that its daily local news broadcasts cover news stories specific to the counties containing the communities here in question. In support of this contention, the petitioner submits an affidavit of Hugh J. Breslin, III, the General Manager of WHAG-TV. The affidavit cites, on a county-by-county basis, examples of stories covered by WHAG-TV concerning events in the ten counties, followed by an assertion that the Washington, D.C. stations "did not cover these stories, or did not cover them with the same depth as did WHAG-TV". The petitioner points out that its city of license, Hagerstown, Maryland, is geographically closer to the communities at issue in the Washington, D.C. ADI than is Washington, D.C. itself. With respect to Garrett County, the petitioner maintains that because of Garrett's rural nature and the fact that it is the westernmost county in Maryland, there are no Maryland stations, other than WHAG-TV, which can deliver Maryland state news to Garrett County residents. The petitioner further states that non-profit organizations in a number of the counties use WHAG-TV's Community Bulletin Board and its 5-minute "Today In The Valley" television program, which appears each weekday from 8:55 -9:00 a.m., to promote local, volunteer fund raising activities and to inform citizens of program opportunities. WHAG-TV also notes that it airs local telethons in some of the ten counties identified in its petition.

12. As to the issue of whether other stations entitled to mandatory carriage provide local coverage to the communities in question, WHAG-TV asserts that some of the Communities are either beyond or on the outskirts of the predicted Grade B contour provided by the NBC affiliate qualified for carriage. Specifically, with respect to those counties included in the petition that are currently part of the Washington D.C. ADI, WHAG-TV states that Allegany, Maryland; Franklin, Pennsylvania; Morgan, West Virginia; and Hampshire, West Virginia are beyond the predicted Grade B contour provided by WRC, the NBC affiliate entitled to carriage, and that Jefferson, West Virginia and Frederick, Virginia lie on the outskirts of WRC's predicted Grade B contour. WHAG-TV recognizes that most Washington, D.C. stations place Grade B contours over Frederick, Maryland and that WRC's predicted Grade B contour covers a portion of Berkeley, West Virginia. However, WHAG-TV claims that the Washington D.C. stations generally do not cover news of local importance to the eight counties included in the Washington D.C. ADI because of "the geographic distance and the multiplicity of areas serviced by these highly urban stations". The petitioner adds that Fulton, Pennsylvania, which is part of the Johnstown-Altoona, Pennsylvania ADI, lies on the very fringe of the Grade B contour provided by WJAC, the must-carry NBC affiliate.

13. With regard to viewing patterns in the ten counties, the petitioner submits 1992-1993 Arbitron coverage data which, in some instances, indicate that WHAG-TV is the most watched NBC affiliate. However, the viewership data WHAG-TV provides is not consistent from county to county. For some counties, the petitioner submits county coverage figures while, for other counties, it supplies either cable county coverage data or noncable county coverage data or figures for both noncable county coverage and county coverage. We note that WHAG-TV did not provide any viewership data with respect to one county, Frederick County, Virginia. According to the most recent Arbitron county coverage figures, which are a measure of viewing patterns for both cable and noncable households, WHAG-

[15] WHAG-TV does not provide information with respect to historic carriage in Oldtown, Maryland; and Falling Water and Inwood, West Virginia. *See* Appendix A.

[16] WHAG-TV's Grade B contour appears to cover all of the communities in question in Allegany County with the exception of Frostburg, Lonacaning, Luke, Westernport, and the neighboring unincorporated areas. All of the communities in question in Hampshire County also appear to be encompassed by the station's Grade B contour.

[17] Although Garrett is part of the Pittsburgh, Pennsylvania ADI, WHAG-TV asserts that WPXI, the Pittsburgh NBC affiliate, similarly does not place a Grade B contour over Garrett County. WHAG-TV states that WBOY-TV, in Clarksburg, West Virginia places a predicted Grade B contour over the western portion of Garrett County. We note that WJAC, the NBC affiliate in the Johnstown-Altoona, Pennsylvania ADI, provides Grade B contour coverage to approximately half of Garrett County, and achieves substantial viewership as indicated in Appendix C.

TV is the most watched NBC affiliate in the following counties: Allegany, Maryland; Franklin, Pennsylvania; Fulton, Pennsylvania; and Morgan, West Virginia.[18] However, WHAG-TV receives low viewership shares in both Jefferson, West Virginia and Frederick, Virginia and the lowest shares of any NBC affiliate in Frederick, Maryland.[19] The petitioner achieves viewership shares relatively comparable to the must-carry NBC affiliate in Garrett, Maryland; Berkeley, West Virginia; and Hampshire, West Virginia.[20] We note that in Garrett, WHAG-TV receives slightly higher viewership shares than WPXI, the must-carry NBC affiliate from the Pittsburgh, Pennsylvania ADI, but significantly lower shares than WJAC, the NBC affiliate in the Johnstown-Altoona, Pennsylvania ADI.[21]

14. In addition to the evidence presented with respect to the four market modification factors, WHAG-TV also raises other considerations in support of its petition. First, WHAG-TV states that it looks to the ten counties for local advertising revenues and identifies business retailers in some of the counties that advertise on the station.[22] Second, with respect to some counties, WHAG-TV states it will open or has already opened an office in the county or has assigned a full-time news reporter to the county.[23] Third, WHAG-TV maintains that it spent a total of $67,020 in 1992 in advertising the station on county radio stations in Frederick and Allegany Counties, Maryland and in Franklin County, Pennsylvania.

15. In their oppositions to WHAG-TV, Time Warner and CVC argue that neither Congress nor the Commission intended for entire counties to be added to an ADI. The opponents contend that both the 1992 Cable Act and the Commission's rules require that ADI petitions be framed in terms of addressing individual communities, not entire counties. They assert that WHAG-TV's petition should be denied because it seeks the addition of ten counties from three ADIs and is drafted on a county wide, as opposed to an individual community, basis. The opponents point out that the ten counties contain at least 55 different cable communities. Time Warner and CVC argue that the petitioner would have the Commission essentially return to the former 35 mile zone market definition to determine commercial television station must-carry status. They maintain that WHAG-TV is attempting to use the Commission's special relief provisions, not to add specific communities to its ADI, but rather, to create a new ADI where none exists.

16. In response, the petitioner argues that by seeking to include in its ADI those cable communities that have historically carried its signal and communities that WHAG-TV covers with news and local affairs programming, WHAG-TV is doing exactly what Congress contemplated when it enacted the market modification provisions of the 1992 Cable Act. WHAG-TV asserts that Time Warner and CVC are pleading form over substance by arguing that the petition should be denied because it lists cable systems by county rather than by community. WHAG-TV states that the fact that it seeks the inclusion of a large number of communities in its ADI and that it chose, for administrative convenience, to group these communities by cable systems, and then cable systems by counties, has nothing to do with the substance of its petition and does not render it invalid. The petitioner insists that it listed the cable communities it sought to add to its ADI in the most logical order possible and that nothing in the Commission's rules requires that the petition adhere to any particular form of pleading. WHAG-TV also notes that viewership data is only available on a county wide basis. The petitioner states that had it listed each cable community separately and presented its evidence under the four-prong test for each community, neither the evidence nor the arguments would have been any different. WHAG-TV maintains that it needs to add a substantial number of communities to its ADI because it is licensed to a single county ADI. The petitioner also contends that the opponents do not raise any substantive arguments to rebut its request. WHAG-TV points out that neither Time Warner nor CVC dispute any of the facts presented in its petition or argue that the facts which are presented on a county wide basis do not apply to the communities served by the cable systems.

17. WRC opposes WHAG-TV's petition with respect to the eight counties included in the Washington, D.C. ADI. WRC insists that the petition should be denied because it "greatly exceeds the scope of market adjustments that are appropriate under the Commission's market modification rules". Like Time Warner and CVC, WRC contends that the Commission is authorized to make market modifications on a community-by-community basis and that WHAG-TV's petition should be denied because it asks the Commission to make "wholesale changes" to the station's ADI on a county-by-county basis.

18. WRC further argues that the petition fails on the merits. WRC maintains that while it may be possible for a petitioner to justify adding an entire county to its ADI by providing the requisite information to support relief in each community in the county, WHAG-TV has not made such a showing in this case. WRC asserts that the "petition provides no community-specific information in support of

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[18] *See* Appendix C.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Specifically, WHAG-TV states that business retailers in Frederick County, Maryland earned the station over $170,000 in advertising revenue in 1992, representing 9.1 percent of WHAG-TV's local advertising revenue. The petitioner further asserts that retailers in Allegany County, Maryland generated $196,741 in advertising revenue, representing approximately 10.5 percent of the station's local advertising revenue. WHAG-TV also identifies specific retailers in the following counties that advertise on the station: Garrett, Maryland; Franklin, Pennsylvania; Fulton, Pennsylvania; Berkeley, West Virginia; Jefferson, West Virginia; Frederick, Virginia; and Hampshire, West Virginia. The only county for which WHAG-TV does not provide any evidence concerning advertising revenues or advertising businesses is Morgan County, West Virginia.

[23] The affidavit of Hugh J. Breslin, III, General Manager of WHAG-TV, indicates that WHAG-TV planned to open an office in Frederick County, Maryland in 1993 to provide daily local news coverage, advertising services and commercial production facilities for the County. In his affidavit, Mr. Breslin also states that WHAG-TV opened a sales office in Allegany County in 1981 to service business retailers and expanded this office in 1987 to include a news bureau and full-time news reporter. According to the petitioner, WHAG-TV provides daily news coverage of Garrett County events through the station's Allegany County news bureau. WHAG-TV also asserts that it serves Franklin and Fulton Counties, Pennsylvania and Berkeley County, West Virginia with daily local news coverage by assigning full-time news reporters to these counties.

its request" and, instead, consists of "broad-brush statements about each county." WRC contends that the petitioner's showing with regard to local service is insufficient to support its request to expand its ADI. WRC argues, for instance, that listing a handful of local stories broadcast to Frederick, Maryland by WHAG-TV over a two month period, without providing information concerning the length or scope of the stories, fails to demonstrate a level of local coverage that would justify granting the petition. WRC also argues that, although WHAG-TV seeks to add all of the communities in the given counties to its ADI, the local coverage information the station provides generally relates to only one or some of the communities in the counties.

19. As to the issue of viewing patterns, WRC points out that the petitioner did not provide Arbitron data for both cable and noncable homes with respect to each county. WRC contends that, since the petitioner is required to provide this information, its request is "patently deficient" for each county for which it failed to provide both sets of data. WRC also maintains that WHAG-TV has never sought or obtained "significantly viewed" status in any of the counties at issue and suggests that the petitioner may not achieve levels of viewing sufficient to entitle it to such status in many of the counties. Finally, WRC claims that the petitioner failed to provide sufficient information regarding the coverage provided by stations in the Washington, D.C. ADI. Specifically, WRC argues that assertions made in an affidavit by the general manager of WHAG-TV that the Washington, D.C. stations did not cover certain stories or did not cover them with the same depth as did the petitioner are insufficient to prove that the Washington, D.C. stations do not provide local service.

20. In response, WHAG-TV reiterates that it needs to expand its ADI because the Hagerstown, Maryland ADI currently consists of only one county. The petitioner contends that, without relief, it will not even be eligible for mandatory carriage on cable systems operating only a few miles from its transmission site. In addition, WHAG-TV contends that it is not required to separately demonstrate a need for carriage in each community in every county requested. The petitioner argues that WRC's proposed evidentiary standard, requiring that WHAG-TV make a separate showing under the four-prong test for each and every community of every county requested, was not contemplated by the statute and would be impossible to meet. The petitioner explains that permitting it to add to its ADI only those communities in a given county for which it has made a specific showing of local programming, and not allowing it to include other communities within the same county, would have no practical effect in cases where a single, fully integrated cable system serves the entire county. The petitioner also contends that WRC's standard would, conceivably, require WHAG-TV to provide ratings data on a community-by-community basis which would be virtually impossible and prohibitively expensive to do. Finally, the petitioner asserts that WRC, itself, does not offer any evidence that it provides local service to the communities identified in WHAG-TV's petition. WHAG-TV urges the Commission to take this absence of evidence as an admission by WRC that the station does not provide adequate local service to the communities at issue.

## ANALYSIS AND DECISION

21. We shall grant WHAG-TV's petition with respect to all of the communities in question except for those located in Garrett County, Maryland. The petitioner has made a persuasive case that the communities at issue, other than those in Garrett County, are logically part of WHAG-TV's market for purposes of the cable television mandatory broadcast signal carriage rules under the standards set forth in §614(h) of the Communications Act. At the outset, we note that while we consider requests for ADI modifications on a community-by-community basis, petitioners are not limited in the number of communities for which modification may be sought, provided that the communities in question are specifically identified and appropriate evidence is submitted. In this case, WHAG-TV has identified the communities it seeks to have added to its ADI, and has submitted evidence for evaluation. The fact that the specified communities are grouped according to county in the petition is immaterial.

22. WHAG-TV has presented evidence with respect to all of the Communities, excluding those in Garrett County, that its request for market modification complies with the four statutory elements. We note, too, that Hagerstown, Maryland, WHAG-TV's city of license, is geographically closer to most of the communities in question than is Washington, D.C., WRC's community of license. WHAG-TV has demonstrated a long history of carriage on the cable systems serving all but three of the communities identified in its petition.[24] In addition, with the exception of Garrett County, and a small portion of Allegany County, WHAG-TV has shown that it provides Grade B contour coverage to all of the communities in question. In fact, WHAG-TV states that it provides Grade A contour or City Grade coverage to a number of the counties or portions thereof. We have previously stated that the presence of a Grade B contour is indicative of coverage or local service in a community and is sufficient to satisfy the second factor of the four-prong test.[25] Thus, we conclude that the petitioner satisfies the coverage or local service requirement in those communities covered by WHAG-TV's Grade B contour.

23. It appears that other stations qualified for carriage offer coverage to the communities in question. However, we do not believe that Congress intended for the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. In this case, because other stations do appear to serve the communities in question, this enhancement factor does not appear applicable. With respect to the viewership issue, the most recent Arbitron county coverage figures indicate that WHAG-TV achieves viewing shares greater than or comparable to the must-carry NBC affiliate in a number of the counties.[26] In those counties, with the exception of

[24] *See* Appendix A.
[25] 8 FCC Rcd at 2977. *See also* paragraph 5, *supra*.
[26] *See* paragraph 13, *supra*, and Appendix C. Appendix C displays combined off-air and cable audience data. We have also reviewed the disaggregated data from those counties where it is available. As would be expected, in those areas closest to Wash-

Garrett, Maryland, where WHAG-TV receives relatively low viewership shares, the combination of other factors, such as historical carriage and coverage or local service, makes the case for inclusion of the communities in WHAG-TV's ADI.

24. As noted above, the petitioner does not provide Grade B contour coverage to Garrett County and to a small portion of Allegany County. In the cases of the Allegany County communities,[27] we believe that because other factors weigh in favor of granting WHAG-TV's market modification request, the absence of Grade B contour coverage over these communities should not prevent the communities from being included in WHAG-TV's ADI. For one, the petitioner has demonstrated a history of carriage on cable systems serving the area. Regarding the issue of other station coverage, the petitioner asserts that no Washington, D.C. station places a Grade B contour over any of Allegany County, which is part of the Washington, D.C. ADI. In addition, we note that WRC does not appear to provide local programming to Allegany as evidenced by the fact that the station is not even listed in the 1993-1994 Arbitron county coverage reports. According to the most recent Arbitron county coverage figures, WHAG-TV is the most-watched NBC affiliate in Allegany County.[28]

25. Turning to Garrett County, we find that the petitioner satisfies only one of the four statutory factors. WHAG-TV has demonstrated a history of carriage on the cable system serving this county. However, the petitioner's Grade B contour does not cover any of Garrett County. Although Garrett County is located in Maryland, it is part of the Pittsburgh, Pennsylvania ADI. WHAG-TV argues that it is the only Maryland station which can deliver Maryland state news to the residents of Garrett County. However, we do not find this argument compelling in light of the viewership patterns of Garrett County residents. Viewership data indicate that a community of interest exists between Garrett County and the Johnstown-Altoona, Pennsylvania ADI. The most recent Arbitron viewership figures reveal that WJAC, the NBC affiliate in the Johnstown-Altoona, Pennsylvania ADI, is the most watched NBC station, by far, in Garrett County.[29] While WPXI, the must-carry NBC affiliate in Garrett County, receives a 3 share and WHAG-TV garners a 4 share, WJAC achieves an overwhelming 12 share.[30] These figures suggest that Garrett County is not logically part of WHAG-TV's market for purposes of the mandatory broadcast signal carriage rules.

## ORDER

26. In view of the foregoing, we find that grant of WHAG-TV's petition with respect to the communities in question in the following counties is in the public interest: Frederick and Allegany Counties in Maryland; Franklin and Fulton Counties in Pennsylvania; Berkeley, Jefferson, Morgan and Hampshire Counties in West Virginia; and Frederick County in Virginia.[31] We further find that grant of WHAG-TV's petition with respect to the communities in question in Garrett County, Maryland is not in the public interest.

27. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed May 13, 1993 by Great Trails Broadcasting Corporation is GRANTED to the extent indicated in paragraph 26, *supra*, and in all other respects IS DENIED. WHAG-TV shall notify the relevant cable systems in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within sixty (60) days of such notification.

28. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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ington, D.C., the Washington (or Baltimore) stations tend to have somewhat higher over-the-air than cable audience and in those areas more distant their over-the-air audience declines. In no situation, however, does this information persuade us that a different outcome would be warranted.

27 *See* note 16, *supra*.

28 *See* Appendix C.

29 *Id.*

30 *Id.* Over the air WJAC has a 23 share of the audience.

31 The Frederick, Maryland; Allegany, Maryland; Franklin, Pennsylvania; Berkeley, West Virginia; Jefferson, West Virginia; Morgan, West Virginia; Hampshire, West Virginia; and Frederick,Virginia communities at issue also remain within the Washington, D.C. ADI. The Fulton County, Pennsylvania communities at issue also remain within the Johnstown-Altoona, Pennsylvania ADI.

## Appendix A

| County | Cable System | Historic Carriage | Communities |
|---|---|---|---|
| Maryland: | | | |
| Frederick | Frederick Cablevision Inc. | 1972 | Frederick, Middletown, Walkersville, Thurmont, Brunswick, Emmitsburg, and unincorporated Frederick County |
| Allegany | TCI Cablevision of Maryland | 1972 | Cumberland, Bowling Green, Cresaptown, Eckhart, LaVale, Mount Savage, Potomac Park, and unincorporated areas of Allegany County |
| | CMA Cablevision Associates VII | 1972 | Frostburg, Lonacaning, Luke, Westernport, and unincorporated areas of Allegany County |
| | Oldtown Community Systems, Inc | ____ | Oldtown |
| Garrett | Triax Cablevision | 1984 | Oakland, Mountain Lake Park, and unincorporated areas of Garrett County |
| Pennsylvania: | | | |
| Franklin | Warner Cable of Chambersburg | 1972 | Chambersburg, Shippensburg, and unincorporated areas of Franklin County |
| | Cumberland Valley Cable TV | 1972 | Greencastle and unincorporated areas of Franklin County |
| | TV Cable of Waynesboro | 1972 | Waynesboro, Mont Alto, Rouzerville, Wayne Heights, and unincorporated areas of Franklin County |
| | CMA XI | 1972 | Mercersburg and unincorporated areas of Franklin County |
| Fulton | CMA XI | 1972 | McConnellsburg and unincorporated areas of Fulton County |

| County | Cable System | Historic Carriage | Communities |
|---|---|---|---|
| West Virginia: | | | |
| Berkeley | Warner Cable of Martinsburg | 1972 | Martinsburg and unincorporated areas of Berkeley County |
| | TV Cable of Inwood | ____ | Inwood |
| | Berkeley Cable Communications | ____ | Falling Water |
| Jefferson | C/R TV Cable | 1972 | Charles Town, Ranson, Shepherdstown, Harpers Ferry, and unincorporated areas of Jefferson County |
| Morgan | Tele-Media Corp | 1972 | Berkeley Springs and unincorporated portions of Morgan County |
| Hampshire | TCI of Maryland | 1972 | Romney and unincorporated portions of Hampshire County |
| | CMA Cablevision Associates VII | 1977 | Augusta and unincorporated portions of Hampshire County |
| | Valley Cable | 1977 | Capon Bridge and unincorporated portions of Hampshire County |
| Virginia: | | | |
| Frederick | Adelphia Cable | 1977 | Winchester and unincorporated portions of Frederick County |

## Appendix B

**Washington, D.C. ADI:**

Frederick County, MD
Allegany County, MD
Franklin County, PA
Berkeley County, WV
Jefferson County, WV
Frederick County,VA
Morgan County, WV
Hampshire County, WV

**Pittsburgh, PA ADI:**

Garrett County, MD

**Johnstown-Altoona, PA ADI:**

Fulton County, PA

## Appendix C

Arbitron Television County Coverage Figures: 1993-1994*

| County and Station | Total Share | Net Circulation |
|---|---|---|
| (1) Frederick County, MD | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 1 | 16 |
| WRC-TV (NBC, Ch. 4), Washington, DC | 11 | 70 |
| WMAR (NBC, Ch. 02), Baltimore, MD | 8 | 56 |
| (2) Allegany County, MD | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 12 | 78 |
| WJAC (NBC, Ch. 6), Johnstown-Altoona, PA | 1 | 5 |
| (3) Garrett County, MD | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 4 | 40 |
| WPXI (NBC, Ch. 11), Pittsburgh, PA | 3 | 26 |
| WJAC (NBC, Ch. 6), Johnstown-Altoona, PA | 12 | 80 |
| (4) Franklin County, PA | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 8 | 50 |
| WRC-TV (NBC, Ch. 4), Washington, DC | 4 | 35 |
| WGAL (NBC, Ch. 8), Harrsbg-York-Lancast-Lebanon, PA | 7 | 45 |
| WMAR (NBC, Ch. 2), Baltimore, MD | 4 | 16 |
| WJAC (NBC, Ch. 6), Johnstown-Altoona, PA | 1 | 5 |
| (5) Fulton County, PA | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 12 | 38 |
| WJAC (NBC, Ch. 6), Johnstown-Altoona, PA | 2 | 24 |
| WGAL (NBC, Ch. 8), Harrsbg-York-Lancast-Lebanon, PA | 2 | 24 |
| WMAR (NBC, Ch. 2), Baltimore, MD | 4 | 6 |
| (6) Berkeley County, WV | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 8 | 37 |
| WRC-TV (NBC, Ch. 4), Washington, DC | 11 | 76 |
| WMAR (NBC, Ch. 2), Baltimore, MD | 1 | 8 |

| | | |
|---|---|---|
| (7) Jefferson County, WV | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 2 | 18 |
| WRC-TV (NBC, Ch. 4), Washington, DC | 14 | 80 |
| WMAR (NBC, Ch. 2), Baltimore, MD | 2 | 12 |
| (8) Morgan County, WV | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 11 | 74 |
| WRC-TV (NBC, Ch. 4), Washington, DC | 9 | 45 |
| (9) Hampshire County, WV | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 5 | 20 |
| WRC-TV (NBC, Ch. 4), Washington, DC | 6 | 30 |
| WJAC (NBC, Ch. 6), Johnstown-Altoona, PA | 2 | 8 |
| WXIA (NBC, Ch. 11), Atlanta, GA | 1 | 8 |
| (10) Frederick County, VA | | |
| WHAG-TV (NBC, Ch. 25), Hagerstown, MD | 2 | 18 |
| WRC-TV (NBC, Ch. 4), Washington, DC | 11 | 71 |
| WMAR (NBC, Ch. 2), Baltimore, MD | 1 | 5 |

* Arbitron's 1993-1994 *Television County Coverage* (Standard/Fringe- including both cable and non-cable viewing): Maryland/District of Columbia, Pennsylvania, West Virginia, and Virginia/District of Columbia.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AT&T CORP.

| | |
|---|---|
| Application for authority to resell international voice services between the United States and overseas points. | File No. I-T-C-95-298 |
| Application for authority to acquire and operate facilities in the ARIANE 2 Cable System beytween Greece and France. | File No. I-T-C-95-305 |
| Application for authority to acquire and operate facilities in the KATTEGAT-1 Cable System between Denmark and Sweden. | File No. I-T-C-95-326 |

**MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: July 28, 1995; Released: August 11, 1995**

By the Chief, Telecommunications Division:

1. We have under consideration three applications filed by AT&T Corp. pursuant to Section 214 of the Communications Act of 1934, as amended, requesting authority, inter alia, to provide international switched services by the resale of the switched voice services of various carriers, and to acquire and operate facilities in the ARIANE 2 and KATTEGAT 1 Cable Systems. The applications were placed on public notice. Petitions to Deny the applications were filed by Telefonica Larga Distancia de Puerto Rico, Inc. (TLD). AT&T filed its oppositions to the petitions and TLD replied.

2. TLD argues that AT&T's applications should be denied or deferred pending final action on the Commission's Notice of Proposed Rulemaking on market entry and regulation of foreign-affiliated entities.[1] TLD states that AT&T has previously argued in a petition against a TLD application that the Commission should not grant any application of a foreign-affiliated carrier before it completes the foreign carrier rulemaking.[2] Although TLD disagrees with AT&T's position, TLD states that all applications filed by foreign-affiliated carriers should be processed in the same manner. Therefore, because AT&T has affiliations with foreign carriers, TLD argues that if the Commission defers action on TLD's applications, it should also defer action on AT&T's applications.

3. In response, AT&T states that TLD's petition is simply a retaliatory reaction to AT&T's opposition to TLD's proposal to expand significantly its existing authority by entering the mainland U.S. telecommunications market. AT&T further states that it already provides facilities-based services to all of the requested points. It now requests authority only to resell the switched services of other facilities-based carriers and to acquire facilities in new overseas submarine cables. In its reply, TLD again states that all foreign-affiliated carriers should be treated the same way by the Commission.

4. We will first address TLD's principal argument that we should delay acting on AT&T's applications pending completion of the foreign carrier rulemaking. We are not delaying action on any applications, TLD's or any other, pending a decision in the foreign carrier rulemaking. Instead, we are granting applications subject to any action the Commission takes in that rulemaking proceeding. TLD's applications are being considered in turn on their own merits, and any procedural delay is a result of the complexities of the issues raised in the applications, not the Commission's waiting for the completion of the rulemaking.

5. We now address the underlying question of AT&T's status as a carrier with foreign affiliates and its entry into the U.S. market for resale services, as well as its acquisition of new facilities to previously authorized points. Although AT&T is a U.S. corporation owned by U.S. citizens, its participation in ownership of foreign carriers does make AT&T a carrier affiliated with a foreign carrier, as defined in Section 63.01(r) of the Commission's Rules. These affiliations, however, do not necessitate the denial of AT&T's applications nor the imposition of special conditions.

6. First, the Commission has had a long-standing open entry policy for applicants affiliated with foreign carriers, such as AT&T that seek authority for resale of international switched services. In *International Services*, the Commission found that open entry for switched service resale increases competition, without resulting in substantial potential for competitive harm.[3] Although the Commission recently issued a Notice of Proposed Rulemaking that comprehensively examines all of the Commission's policies regarding U.S. market entry by foreign-affiliated carriers, the Commission has not proposed to change its open entry policy for such carriers seeking to provide resale of switched services Therefore, we find that grant of AT&T's resale application would be consistent with Commission policy. We note, however, that grant of AT&T's application will be subject to any modifications to the Commission's open entry policy that might be adopted in the pending rulemaking proceeding.

7. Second, the Commission believes that grant of the facilities-based applications is in the public interest despite AT&T's affiliations. AT&T has authority to serve all of the points requested to be served by the cables in which it

[1] *See Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 95-22, 10 FCC Rcd 4844 (1995) (Foreign Carrier Rulemaking).

[2] *See* AT&T Petition to Deny (File No. I-T-C-95-248) (May 1, 1995).

[3] *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331, 7335 (1992) (*International Services*).

seeks ownership. The purpose of the applications is to provide media diversity and better service between the United States and these points. This is a very limited expansion of AT&T's authority that does not give rise to concerns about potential discrimination or anticompetitive conduct by AT&T.

8. In light of the above, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched resale service to the general public by AT&T, and the addition of facilities.

9. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-95-298, I-T-C-95-305 and I-T-C-95-326 ARE GRANTED, and AT&T is authorized to:

a. provide international switched services by the resale of the international switched voice services set forth in MCI's Tariff No. 1, Sprint's Tariff FCC No. 1, and LDDS' Tariff FCC No. 1 between the United States and the overseas points listed in those tariffs;

b. acquire on an ownership basis a one-half interest in and operate 9 MIUs[4] of capacity in the ARIANE 2 Cable System between Greece and France;

c. acquire by lease or other comparable means a one-half interest in any necessary overseas connecting facilities;

d. use the facilities in b and c, above, to provide AT&T's regularly authorized services between the United States, on the one hand, and Cyprus, Lebanon and Greece, on the other hand;

e. acquire on an ownership basis a one-half interest in and operate 6 MIUs[5] of capacity in the KATTEGAT 1 Cable System between Denmark and Sweden;

f. acquire by lease or other comparable means a one-half interest in and operate any necessary overseas connecting facilities; and

g. use the facilities in e and f, above, to provide AT&T's regularly authorized services between the United States, on the one hand, and Finland, Latvia and Sweden, on the other hand.

10. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

11. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

12. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

13. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

14. IT IS FURTHER ORDERED that the Petitions to Deny filed by TLD are hereby DENIED.

15. IT IS FURTHER ORDERED that the authority granted herein is subject to any action the Commission may take in its Notice of Proposed Rulemaking, IB Docket No. 95-22, 10 FCC Rcd 4844 (1995).

16. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[4] A MIU is defined in the ARIANE 2 Cable System C&MA as the minimum unit of investment consisting of 2,176,000 fundamental units of ownership. The MIU is equivalent to 30 MAUOs consisting of 2,048,000 usable bits per second and an additional 128.000 bits per second for multiplexing each of the 64 MIUs in a basic system module.

[5] A MIU is defined in the KATTEGAT 1 Cable System C&MA as the minimum unit of investment consisting of 2,048,000 bps digital stream which will be used for purposes of ownership allocation.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Kingdon R. Hughes

Request for Waiver of
Section 95.863 of the
Commission's Rules

**ORDER**

**Adopted: August 2, 1995; Released: August 11, 1995**

By the Chief, Wireless Telecommunications Bureau:

## I. INTRODUCTION

1. Kingdon R. Hughes (Hughes) has requested a waiver of Section 95.863 of the rules[1] to permit response transmitter units (RTUs) operating under Hughes' Interactive Video and Data Service (IVDS) license(s) for Philadelphia,[2] in areas outside the predicted Grade B contour of TV channel 13 stations, to exceed the maximum duty cycle specified in the rules. For the reasons discussed below we are granting Hughes' request.

## II. BACKGROUND

2. On January 16, 1992, the Commission adopted a *Report and Order (R&O)* establishing a frequency allocation and service rules for IVDS.[3] One of the principal concerns at that time was to ensure that IVDS operations do not cause any interference to TV channel 13 reception. The Commission adopted a general rule concerning non-interference as well as limits on power and antenna height.[4] As an "additional interference safeguard" the Commission adopted a maximum duty cycle for RTUs.[5]

3. Hughes states that he has aggressively pursued system construction and has developed several IVDS applications.[6] According to Hughes, he has successfully completed testing one application which uses IVDS spectrum to link automatic teller machines (ATMs) to a bank's central computer.[7] To make this application economically viable, however, Hughes argues that an increase of the maximum permitted duty cycle under §95.863 is necessary.[8]

4. In support of the request, Hughes states that the predicted Grade B contours of the two TV channel 13 stations in the surrounding area, WJZ-TV Baltimore and WNET Newark, cover only a very small portion of the Philadelphia market and that he is not asking for a waiver of the duty cycle in those areas. Further, Hughes argues that the actual Grade B contours of these stations do not cover the Philadelphia market at all. In addition, Hughes notes that he is licensed for IVDS Segment B which is further away from the band used by TV channel 13 than Segment A.[9] Also, Hughes argues that the duty cycle limit achieves a reduction in interference equivalent to a 4 db reduction in power. In the unlikely event that there is some interference, Hughes argues that it can be easily remedied by cutting RTU power. Hughes also points out that households located in fringe coverage areas must rotate antennas toward the TV transmitter to receive the signal thereby providing additional interference protection from IVDS transmissions.[10] Finally, Hughes contends that the public interest would be served by grant of the waiver because it will enable him to provide a valuable and competitive service to the public.[11]

5. On June 23, 1995, we put Hughes' request out for public comment.[12] The only party to file comments was Erwin Aguayo, Jr. (Aguayo).[13] Aguayo supports the waiver request on the condition that both A-channel and B-channel licensees receive a similar waiver.[14] Aguayo also asks that the Commission grant a blanket waiver of Section 95.863 of the rules.[15] Hughes filed reply comments.

## III. DISCUSSION

6. Pursuant to Section 1.3 of the Commission's Rules,[16] the Commission may waive a provision of its rules if good cause exists and grant of the waiver will not undermine the policies embodied in the general rule.[17] We believe that Hughes has demonstrated unique circumstances such that grant of the waiver would not undermine the intent of the rule - to protect TV channel 13 reception. The duty cycle rule was not one of the principal ways we intended to minimize interference but rather an additional safeguard.[18] In this case, there is not a TV channel 13 located in the Philadelphia market. Although the predicted Grade B contours of two TV channel 13 stations cover a portion of the Philadelphia market, the coverage area is minimal and RTUs operating in these areas would not be allowed to exceed the duty cycle. The fact that outside TV antennas

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[1] Section 95.863 states that the "maximum duty cycle of each RTU shall not exceed 5 seconds per hour, or, alternatively, not exceed one percent within any 100 millisecond interval." 47 C.F.R. §95.863.
[2] The IVDS Philadelphia market is defined as Bucks, Chester, Delaware, Montgomery, Philadelphia, Burlington, Camden and Gloucester counties.
[3] 7 FCC Rcd 1630 (1992).
[4] *See* 47 C.F.R. §§ 95.855, 95.859 and 95.861.
[5] *See* R&O at para. 38.
[6] Hughes petition at 3.
[7] Experimental license, call sign KS2XAE.
[8] Hughes petition at 4.
[9] Segment A is 218-218.5 MHz, Segment B is 218.5-219 MHz and TV channel 13 is 210-216 MHz.
[10] Hughes petition at 7.
[11] Hughes petition at 8.
[12] Public Notice, Mimeo 54505, released June 23, 1995.
[13] Late-filed comments were filed by Radio Telecom and Technology, Inc. (RTT) and are not being considered. Hughes filed further reply comments in response to the RTT filing.
[14] Aguayo at 2.
[15] Aguayo at 2 and 5.
[16] 47 C.F.R. § 1.3.
[17] Thomas Radio v. FCC, 716 F.2d 921 (D.C. Cir 1983); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir 1969).
[18] *See* note 5, supra.

will be pointed in the opposite direction of IVDS transmissions should provide additional protection. Finally, Hughes must still comply with the power and antenna limits and his obligation under the rules to resolve any interference problems created by his system to reception of TV channel 13 inside the predicted Grade B contour.

7. In regard to Aguayo's comments, the A-channel licensee for Philadelphia did not request a waiver. Therefore, the grant of such a waiver to the A-channel licensee is neither justified nor appropriate. Further, it is not appropriate to address eliminating the duty cycle requirement contained in Section 95.863 of the rules in response to comments to a Public Notice of an individual waiver request. That issue must be addressed in a notice and comment rulemaking proceeding.[19]

## IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, under the authority contained in Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, and pursuant to the authority of Section 4(i) and 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303(g), the request for waiver of Section 95.863 filed by Kingdon R. Hughes to operate fixed RTUs exceeding the duty cycle inside the IVDS Philadelphia market, but outside the predicted Grade B contour of TV channel 13 stations, IS GRANTED. This waiver may be terminated by the Commission at any time if, at its discretion, the need for such action arises.

9. For further information regarding this Order contact the Private Wireless Division, (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

[19] We note here that we have received comments to WT Docket No. 95-47, 10 FCC Rcd 4981(1995), suggesting that we eliminate the duty cycle. We will consider this issue in that proceeding.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Concord TV Cable — CUID No. CA0441, Contra Costa County, CA

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 17, 1995; Released: April 21, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Concord TV Cable ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed an FCC Form 393 submission in response to this rate complaint; Operator has also filed amended and supplemental Form 393 filings, most recently on March 15, 1995, in response to an inquiry by Commission staff.[11]

5. On March 28, 1994, Operator filed a motion to dismiss this complaint because the complainant failed to list the channels included in the CPS tier or otherwise describe the cable programming service at issue. Complainant filed its complaint on a revised FCC Form 329, released by the Commission in January 1994, that does not require an itemization of the channels in the CPS tier. Operator argues that the revised FCC Form 329 is deficient because it does not request "a description of the cable programming service or associated equipment involved and, if applicable, how the service or associated equipment has changed."[12] Operator's argument does not persuade us that the complaint is invalid or should be dismissed. The Commission revised Form 329 because experience had shown that the prior Form 329 requested unnecessary information and was confusing to many complainants. Form 329 was therefore revised consistent with the congressional mandate to avoid imposing unnecessarily "technical or complicated" plead-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[11] For example, Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice)*.

[12] 47 C.F.R. § 76.951(b)(6).

ing requirements on complainants.[13] In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint. This complaint taken as a whole clearly relates to Operator's price for the CPS tier. We therefore find the complaint valid and deny Operator's motion to dismiss.

6. Operator asserts that its monthly CPS tier price is justified by its benchmark filing because its price is lower than or equal to the maximum permitted charge as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In response to the Commission's rate regulations, on September 1, 1993, Operator restructured its rates. This restructuring, however, is not reflected on Line 101 of Worksheet 1 of Part I I of Operator's FCC Form 393. Instead of entering its currently effective tier prices, as required by the directions for Line 101, Operator entered its previously effective tier prices.[14] Accordingly, Worksheet 1 was adjusted to reflect current tier charge information.

b. In its most recent Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of October 1993. However, the figures Operator used are not consistent with data on which it should have relied in calculating the Inflation Adjustment Factor.[15] Operator used the Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on August 31, 1993 to complete Lines 122 and 125, but used an outdated GNP-PI of 121.8 for the third quarter of 1992 in calculating Line 123. The GNP-PI figure for the third quarter of 1992 released on August 31, 1993 was 122.5. Operator's calculation of the Inflation Adjustment Factor is thus incorrect. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Operator filed.[16] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator's showing supports the maximum reasonable CPS tier price shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint (as set forth in Appendix A) to May 14, 1994.[17] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referred to in Appendix A against the cable programming service price charged by Operator in the area referenced above and at Appendix A herein IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Operator justifies the maximum reasonable price set forth in Appendix B (plus franchise fee) for Operator's cable programming service tier.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price set forth in Appendix B (plus franchise fee).[18]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in the franchise area addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

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[13] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 64 (1992); *see also* Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5843-44, para. 339 (1993).

[14] The instructions for Line 101 of FCC Form 393 state: "In the relevant column, enter your *current* monthly charge for your basic service tier and for each tier of cable programming service that you offer to subscribers in the community unit for which the form is being completed." (emphasis added) (footnote omitted).

[15] In its filing in response to the *Public Notic* e, Operator stated that it calculated the Inflation Adjustment Factor in accordance with the instructions set out in the *Public Notice*. However, the maximum permitted rate that Operator calculated in that filing is not consistent with this assertion.

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of anlysis).

[17] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| CA0441 | 2/25/94 | 2/25/94 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| CA0441 | $11.75 | $11.69 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| TCI Cablevision of Colorado, Inc. | CUID Nos. CO0159 (Littleton), CO0215 (Thornton), CO0264 (Northglen) and CO0359 (Adams County) |
| TCI Cablevision of Northern Illinois, Inc. | CUID Nos. IL0137 (Algonquin), IL0139 (West DunDee), IL0140 (Lake in the Hills), IL0141 (East Dundee), IL0149 (Lakewood) and IL1236 (Kane County) |
| TCI of Northern Indiana, Inc. | CUID No. IN0103 (Hammond) |
| TCI Cablevision of Missouri, Inc. | CUID No. MO0129 (Columbia) |
| TCI Cablevision of Nevada, Inc. | CUID No. NV0007 (Sparks) |

Benchmark Filing to Justify Cable Programming Service Rates

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 18, 1995; Released: April 24, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price TCI Cablevision of Colorado, Inc., TCI Cablevision of Northern Illinois, Inc., TCI of Northern Indiana, Inc., TCI Cablevision of Missouri, Inc. and TCI Cablevision of Nevada, Inc. (collectively "Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than or equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance
Division, Cable Service Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Northland Cable Properties Four Limited Partnership — CUID No. TX1112 (Red Ackers)

Order Denying Jurisdiction

## MEMORANDUM OPINION AND ORDER

**Adopted: April 17, 1995; Released: April 24, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| | CUID Nos. CT0115 (Darien) |
| Cablevision of | CT0116 (Easton) |
| Connecticut, L.P. | CT0117 (Greenwich) |
| | CT0118 (New Canaan) |
| | CT0119 (Norwalk) |
| | CT0120 (Redding) |
| | CT0121 (Stamford) |
| | CT0122 (Weston) |
| | CT0123 (Westport) |
| | CT0124 (Wilton) |

Benchmark Filing to Justify Cable Programming Service Rates

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 18, 1995; Released: April 24, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Cablevision of Connecticut, L.P. ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximumP permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Service Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| | CUID Nos. CT0055 (Bridgeport) |
| Cablevision Systems of Southern | CT0056 (Stratford) |
| Connecticut, L.P. | CT0057 (Orange) |
| | CT0058 (Woodbridge) |
| | CT0059 (Milford) |
| Benchmark Filing to Justify Cable | CT0114 (Fairfield) |
| Programming Service Rates | |

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 18, 1995; Released: April 24, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Cablevision Systems of Southern Connecticut, L.P. ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Paragon Cable — CUID No. TX0505 (San Antonio)

Benchmark Filing to Justify Cable Programming Service Rates

## MEMORANDUM OPINION AND ORDER

**Adopted: April 18, 1995; Released: April 24, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Paragon Cable ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. On December 6, 1993, Operator filed a Motion to Dismiss the complaint referenced herein. First, Operator asserts that the complainant incorrectly answered question number 8 on FCC Form 393 as it then existed because he included the rate for service on the basic tier, as well as for service on the CPS tier. Second, Operator asserts that the complainant incorrectly answered question number 9 because he included channels that are offered on the basic tier, as well as channels that are offered on the CPS tier. Operator's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in answer number 8 indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate and that he believed that rate was unreasonable.[11] We therefore find the complaint valid and deny Operator's Motion to Dismiss.

5. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[12]

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the motion filed by Operator to dismiss the complaint referenced herein IS DENIED.

---

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] We note that in January 1994 the Commission released a revised Form 329 that omitted question 9.

[12] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

7. IT IS FURTHER ORDERED that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Williamson County Cablevision — CUID No. TX0283 (Georgetown)

Benchmark Filing to Justify Cable Programming Service Rates

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 18, 1995; Released: April 24, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Williamson County Cablevision ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Middlesex CUID No. NJ0233
Manville CUID No. NJ0290
Aberdeen CUID No. NJ0400
Bridgeport CUID No. NJ0330

TKR Cable Company (Tri-System)

Order Denying Jurisdiction

Newark CUID Nos. NJ0234, NJ0235, NJ0236, NJ0237, NJ0238, NJ0239, NJ0262, NJ0263, NJ0289, NJ0291, NJ0292, NJ0348, NJ0364, NJ0370, NJ0371, NJ0376, NJ0377, NJ0398, NJ0399, NJ0401, NJ0408, NJ0485, NJ0486, NJ0572

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

## MEMORANDUM OPINION AND ORDER

**Adopted: April 18, 1995; Released: April 24, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaints filed against Operator, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in these communities. The complaints therefore do not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 15, 1994, against the cable programming service prices charged by Operator in the communities referenced in the caption ARE DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CORRECTED**

In the Matter of

| | |
|---|---|
| Cox Cable | CUID Nos. FL0001 |
| Pensacola, Inc. | (City of Pensacola) |
| Emerald Coast | FL0002 (Escambia County) |
| Cable Television | FL0143 (Okaloosa County) |

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 12, 1995; Released: April 21, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (together, "Operator") were charging for their cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on January 23, 1995.[11]

5. Operator asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than or equal to the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of the Operator's FCC Forms 393 filed for CUID Nos. FL0001 and FL0002, Operator did not correctly account for its income tax expense. By placing entries in these columns, the Operator confirms that it is a tax-paying entity (i.e., a subchapter "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"),* the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra.* Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended,* 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration,* 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration,* 9 FCC Rcd at 4189 n.195.

[11] Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice).*

tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up entries.

b. For CUID No. FL0001, Operator's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) in its most recent filing reflect 15 basic tier channels and 22 CPS tier channels. Based upon channel line-ups that accompanied Operator's Form 393 filings, we count 16 basic tier channels and 22 CPS tier channels. We will therefore increase the number of basic tier channels on Form 393, Part II, Worksheet 1, Line 102 from 15 to 16 (which will increase the number of regulated channels used to calculate the Benchmark Channel Rate on Line 121 from 37 to 38).

c. For CUID No. FL0143, Operator's calculations for its rate-regulated package as of the initial date of regulation in its most recent filing reflect 42 regulated channels and 30 satellite channels. Based upon channel line-ups that accompanied Operator's Form 393 filings, we count 17 basic tier channels, 26 CPS tier channels and 31 satellite channels. We will therefore increase the number of CPS tier channels on Form 393 Part II, Worksheet 1, Line 102 from 25 to 26 (which will increase the number of regulated channels used to calculate the Benchmark Channel Rate on Line 121 from 42 to 43), and increase the number of satellite channels from 30 to 31.

d. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered in Part II, Worksheet I, Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[13] However, Operator's entries on these two lines varied substantially. Accordingly, we changed Line 104 to equal Part III, Line 34 for all of the franchise areas covered by this Order.

e. Because of these errors, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Forms 393, Operator apparently calculated the Inflation Adjustment Factor using data it relied on when it set its CPS prices. If based on this data Form 393 indicated that Operator's prices were reasonable, then Operator would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[14] However, Operator has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data available for the date that Operator was required to file Form 393 for each franchise area.[15] On July 29, 1994, the U. S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate Inflation Adjustment Factors of 1.037 through January 1994 for CUID No. FL0001; and 1.030 through October 1993 for CUID Nos. FL0002 and FL0143.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[16] However, we further determine that for CUID No. FL0143, the total overcharge per subscriber is such a *de minimis* amount that it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in CUID Nos. FL0001 and FL0002 that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[17] to May 14, 1994 which exceeded the maxi-

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[12] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated upon a pre-tax return on investment.")

[13] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations... operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[14] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form."

[16] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

mum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers in CUID Nos. FL0001 and FL0002 for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[18]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order. At the option of the Operator, it may reduce its rates for CUID No. FL0143 pursuant to this paragraph in its next filing adjusting its rates for other reasons, if the total rate reduction required by this Order is less than twenty-five cents per subscriber per month.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith optional supplemental filings in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| FL0001 | 01/26/94 | 01/20/94 |
| FL0002 | 09/28/93 | 09/22/93 |
| FL0143 | 11/08/93 | 10/27/93 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| FL0001 | $12.30 | $11.98 |
| FL0002 | $13.35 | $13.10 |
| FL0143 | $12.65 | $12.64 |

[18] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994 upon completion of our review of Operator's FCC Form 1200 rate filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Cencom of Alabama, L.P. CUID No. AL0528, Trafford, Alabama

Benchmark Filing to Justify Cable Programming Service Rates

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 17, 1995; Released: April 20, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Cencom of Alabama, L.P. ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Time Warner of Greater Boston — CUID No. MA0063, Salem

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 17, 1995; Released: April 21, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator on October 28, 1993[11] and received by the Commission on November 2, 1993. Operator filed FCC Form 393 in response on June 24, 1994.

5. In its benchmark filing of June 24, 1994, Operator calculated a maximum permitted price for the CPS tier of $9.76 per month. However, Operator's actual price for the CPS tier was $9.80 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Operator's calculation's in form 393:

> On its Form 393 filing, Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of November 1993. However, Operator cannot permissibly calculate inflation through the end of November 1993.[12] Based on the service date of the earliest valid complaint, Operator was required to file a rate justification no later than November 29, 1993. If Operator had filed Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[13] Operator cannot claim

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"),* the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS price under the new regulations. *See* para. 3, *infra.* Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended,* 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration,* 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration,* 9 FCC Rcd at 4189 n.195.

[11] Operator states that it did not receive a copy of the complaint at that time. However, the complainant certified on FCC Form 329 that she mailed a copy to Operator on October 28, 1993. Under these circumstances, we will consider October 28, 1993 as the service date for purposes of calculating the inflation adjustment, but we will not consider imposing penalties on Operator for failing to respond to the complaint in a timely manner.

[12] Furthermore, even if November 1993 were a permissible base date, Operator incorrectly calculated the Inflation Adjustment Factor using data from inconsistent U.S. Department of Commerce releases.

[13] FCC Form 393, page 11, instructions for Line 124 (Inflation

an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator should have filed its Form 393.[14] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 forthe third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator should have used in justifying its rates.

6. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $9.63 (plus franchise fee) for the period from the filing of the earliest complaint in this franchise area to May 14, 1994.[15]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the October 28, 1993 complaint against the cable programming service price charged by Operator in the area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community referenced above that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in this franchise area[16] to May 14, 1994 which exceeded the maximum price for this franchise area (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price in this franchise area (plus franchise fee).[17]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in acordance with the most accurate data available at the time of analysis.)

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Dynamic Cablevision of Florida, Inc.
Coral Gables, Florida — CUID No. FL0674

Benchmark Filing To Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 17, 1995; Released: April 21, 1995**

By the Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider a complaint about the prices Dynamic Cablevision of Florida, Inc. ("Operator") was charging for its cable programming service ("CPS") tiers in Coral Gables, Florida, CUID No. FL0674. Operator has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

## PROCEDURAL MATTERS

4. The first complete and timely complaint was served on Operator on September 17, 1993. The Commission received the complaint on September 28, 1993. In response to the complaint, Operator filed an FCC Form 393 on November 15, 1993. Operator amended its justification on June 23, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

5. Operator states that it restructured its service offerings on September 1, 1993. In addition to its basic service tier and a CPS tier called Basic, Operator began offering ten channels on an individual, or a la carte, basis. These a la carte channels could be purchased collectively as one six-channel package (Cable Plus) and one four-channel package (Expanded). This restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Operator in Hialeah, Florida.[12] In the LOI order, we found that the retiering constituted an evasion of rate regulation. We concluded that Operator's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing them must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, a reduction in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Dynamic Cablevision of Florida, Hialeah, Florida*, LOI-93-43, DA 94-1546 (Cab. Serv. Bur., released Dec. 22, 1994). In that case, Operator created two a la carte packages, one of which consisted of six channels that were previously offered as a separate CPS tier, and the other of which consisted of four channels that were removed from an 18-channel CPS tier.

6. On January 23, 1995, Operator filed a Petition for Reconsideration of the Bureau's LOI decision regarding the treatment of its a la carte packages. On March 9, 1995, Operator filed a motion for stay of the LOI decision and a motion requesting the Bureau to defer action on the complaints pending against its CPS rates in Florida until the Bureau rules on the Petition for Reconsideration. On March 29, 1995, the Bureau granted Operator's motion to stay the LOI decision.[13]

## DISCUSSION

7. In its amended benchmark filing, Operator calculated a maximum permitted rate for the Basic CPS tier of $6.45 per month (plus franchise fee). Operator did not attempt to justify its monthly prices of $4.95 for the Cable Plus tier or $0.97 for the Expanded tier. Upon review, we have determined that Operator has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Operator did not count as rate-regulated or as satellite channels the ten channels in its Cable Plus and Expanded packages. In accordance with the Bureau's LOI order, we determine Operator's maximum permitted prices by including the ten channels of Operator's Cable Plus and Expanded packages as additional CPS tiers, thereby increasing the total rate-regulated channels from 40 to 50 and the total satellite channels from 19 to 29.

b. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[14] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

c. Because of these errors, we will set prices for these tiers, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[15] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of September 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date Operator used in justifying its rates, of 1.028.

8. These adjustments have the effect of decreasing the maximum permitted monthly price for the Basic CPS tier to $5.51 per month (plus franchise fee). Operator's actual monthly charge for the tier was $6.37 (plus franchise fee). Therefore, the actual charge for this tier was above the maximum permitted rate and was thus unreasonable.

9. The same adjustment results in a maximum permitted rate for the Cable Plus tier of $2.54 per month (plus franchise fee). Operator's actual monthly charge for the Cable Plus tier was $4.95 (plus franchise fee). Thus, the actual charge for this tier was above the maximum permitted rate and unreasonable.

10. The same adjustment results in a maximum permitted rate for the Expanded tier of $1.69 per month (plus franchise fee). Operator's actual monthly charge for the Expanded tier was $.97 (plus franchise fee). Thus, the actual charge for this tier was below the maximum permitted rate.

11. Under the Commission's rules, Operator may be liable for refunds to compensate subscribers for the overcharges described above. However, since our resolution of the issues pending in Operator's Petition for Reconsideration of our LOI decision could require revisions to our analysis, we will stay the effective date of this Order in response to Operator's motion until we have issued our decision in that proceeding. Since interest charges on any required refunds will continue to accrue during the period of this stay, Operator's subscribers will not be adversely affected.

## CONCLUSIONS

12. Upon review of the record herein, we conclude that, for the period from September 28, 1993, to May 14, 1994, Operator's showing supports maximum reasonable CPS tier prices of $5.51 per month (plus franchise fee) for the Basic CPS tier, $2.54 per month (plus franchise fee) for the Cable Plus tier, and $1.69 per month (plus franchise fee)

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[13] *Dynamic Cablevision of Florida, Hialeah, Florida,* LOI 93-43, DA 95-628 (Cab. Serv. Bur., released Mar. 29, 1995).

[14] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking,* MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393,* Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

for the Expanded tier.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amounts they paid in excess of a reasonable price for the CPS tiers.

13. We further conclude that Operator must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Operator's prices for the Basic and Cable Plus CPS tiers during the earlier period were unreasonable. We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's rate justification for that period.

14. We further conclude that the effective date of this Order will be stayed until the Bureau releases a decision on Operator's Petition for Reconsideration of the Bureau's LOI decision regarding the treatment of Operator's a la carte packages in Hialeah, Florida.

15. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 17, 1993 complaint against the cable programming service prices charged by Operator in Coral Gables, Florida, CUID No. FL0674, IS GRANTED TO THE EXTENT INDICATED HEREIN.

16. IT IS FURTHER ORDERED that the benchmark filing submitted by Operator with respect to Coral Gables, Florida, CUID No. FL0674, for the period of September 28, 1993 to May 14, 1994, justifies maximum prices of $5.51 per month (plus franchise fee) for the Basic CPS tier, $2.54 per month (plus franchise fee) for the Cable Plus tier, and $1.69 per month (plus franchise fee) for the Expanded tier.

17. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers for the period from September 28, 1993[17] to May 14, 1994, that portion of the amounts paid for cable programming service that exceeded $5.51 per month (plus franchise fee) for the Basic CPS tier and $2.54 per month (plus franchise fee) for the Cable Plus tier, and was thus unreasonable, plus interest to the date of the refund.

18. IT IS FURTHER ORDERED that Operator shall determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the effective date of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

19. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that Operator shall, within 30 days of the effective date of this Order, revise its Form 1200 filing for the period beginning May 15, 1994, to include the Cable Plus and Expanded packages as cable programming service tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price determined in this Order (plus franchise fee).

20. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, CPS tier prices for Coral Gables, Florida, CUID No. FL0674, that reflect the reductions in the CPS rate determined in this Order.

21. IT IS FURTHER ORDERED that Operator's motion to defer action on the complaint against its cable programming service prices is resolved as indicated herein.

22. IT IS FURTHER ORDERED that the effective date of this Order will be stayed until the Commission releases a decision on Operator's Petition for Reconsideration of the Bureau's LOI decision regarding the treatment of its a la carte packages in Hialeah, Florida.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[16] These findings are based solely on the representations of Operator listed in paragraphs 4 and 5, *supra*, and the modifications described in paragraph 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Time Warner of Greater Boston — CUID No. MA0097, Melrose

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 17, 1995; Released: April 21, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator on December 1, 1993 and received by the Commission on December 7, 1993.

5. Operator attempted to justify its CPS price through an FCC Form 393 filed on November 24, 1993. Operator also filed an amended Form 393 on June 24, 1994.[11]

6. In its amended benchmark filing of June 24, 1994, Operator calculated a maximum permitted price for the CPS tier of $11.65 per month. However, Operator's actual price for the CPS tier was $11.78 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable.

7. We will therefore set a price for this tier. In doing so we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[12] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates. (We have not found any other apparent errors in Operator's calculation of its maximum permitted CPS price.)

8. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $11.57 (plus

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an ameded FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark fililings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

franchise fee) for the period from the filing of the earliest from the filing of the earliest complaint in this franchise area to May 14, 1994.[13]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the December 1, 1993 complaint against the cable programming service price charged by Operator in the area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community referenced in the caption that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in this franchise area[14] to May 14, 1994 which exceeded the maximum price for this franchise area (plus franchise fee) per month, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price in this franchise area (plus franchise fee).[15]

13. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Time Warner of Greater Boston — CUID No. MA0064, Chelsea

Benchmark Filing to Support
Cable Programming Service Price

## MEMORANDUM OPINION AND ORDER

**Adopted: April 17, 1995; Released: April 21, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator on December 3, 1993 and received by the Commission on December 7, 1993. Operator filed FCC Form 393 in response; Operator also filed an amended Form 393 on June 24, 1994.[11]

5. In its amended benchmark filing of June 24, 1994, Operator calculated a maximum permitted price for the CPS tier of $11.97 per month. However, Operator's actual price for the CPS tier was $11.99 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable.

6. We will therefore set a price for this tier. In doing so we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[12] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates. (We have not found any other apparent errors in Operator's calculation of its maximum permitted CPS price.)

7. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Opeartor implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

a maximum reasonable CPS tier price of $11.89 (plus franchise fee) for the period from the filing of the earliest complaint in this franchise area to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the December 3, 1993 complaint against the cable programming service price charged by Operator in the area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community referenced in the caption that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in this franchise area[14] to May 14, 1994 which exceeded the maximum price for this franchise area (plus franchise fee) per month, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price in this franchise area.[15]

12. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
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| TCI Cablevision of Colorado, Inc. | CUID Nos. CO0051 (Arvada), CO0077 (Lakewood), CO0136 (Adams County), CO0138 (Englewood), CO0140 (Sheridan), CO0142 (Aurora/Adams County), CO0143 (Aurora/Arap. County), CO0146 (Westminster), CO0147 (Commerce City), CO0161 (Golden), CO0196 (Cherry Hills), CO0225 (Edgewater) and CO0251 (Wheat Ridge) |
| TCI Cablevision of South Central Connecticut, Inc. | CUID Nos. CT0064 (Wallingford), CT0065 (Madison), CT0066 (East Haven), CT0067 (Branford), CT0068 (North Branford), CT0069 (North Haven) and CT0070 (Guilford) |
| TCI Cablevision of Wisconsin, Inc. | CUID Nos. WI0007 (Lacrosse), WI0058 (City of Madison), WI0147 (Town of Madison) and WI0161 (Maple Bluff) |

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 2, 1995; Released: May 11, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings, most recently in March, May and June 1994.[11]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common

5. As concerns all of the Colorado franchise areas addressed in this Order except for the one designated by CUID No. CO0251, the actual CPS tier price of TCI Cablevision of Colorado, Inc. ("Colorado Operator") was above the maximum permitted price that it calculated for the CPS tier and, thus, Colorado Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Upon review of Colorado Operator's submission we have found that Colorado Operator has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Colorado Operator's calculations in its Form 393:

a. Colorado Operator incorrectly calculated its benchmark rate as of the initial date of regulation on Form 393, Part II, Worksheet 2, Line 220. The instructions to Form 393 permit an operator to calculate its benchmark channel rate using either the benchmark formula or the benchmark tables. However, the benchmark figure that Colorado Operator entered on Line 220 does not agree with the numbers of regulated channels, satellite channels, and subscribers reported by Colorado Operator using either method. Accordingly, we changed Line 220 to 0.494, the figure yielded by the benchmark formula using the information that Colorado Operator reported.

b. Because Colorado Operator has not demonstrated that its price in these franchise areas was reasonable, we must also recalculate the Inflation Adjustment Factor using the most accurate data currently available for the date for which Colorado Operator filed.[12] Colorado Operator on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Colorado Operator used in justifying its rate, of 1.030.

6. As concerns the franchise areas designated by CUID Nos. WI0058 and WI0147, the actual CPS tier price of TCI Cablevision of Wisconsin, Inc. ("Wisconsin Operator") was above the maximum permitted price that it calculated for the CPS tier and, thus, Wisconsin Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Upon review of Wisconsin Operator's submission we have found that Wisconsin Operator has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Wisconsin Operator's calculations in its Form 393:

a. On its Form 393 filing for CUID No. WI0058 Wisconsin Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of December 1993. However, Wisconsin Operator cannot permissibly calculate inflation through the end of December 1993. Based on the service date of the earliest valid complaint, Wisconsin Operator was required to file a rate justification no later than November 15, 1993. If Wisconsin Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[13] Wisconsin Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Wisconsin Operator should have filed Form 393.[14] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Wisconsin Operator should have used in justifying its rate for CUID No. WI0058, of 1.030.

b. For CUID No. WI0147 the Commission received the first valid complaint on November 29, 1993. Wisconsin Operator has not filed an amended Form 393 in response to this complaint. However, in its Form 1200 for CUID No. WI0058 Wisconsin Operator indicates that its Form 393 for CUID No. WI0058 also covers CUID No. WI0147. As explained above, on its Form 393 filing for CUID No. WI0058, Wisconsin Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of December 1993. However, for CUID No. WI0147 Wisconsin Operator cannot permissibly calculate inflation through the end of December 1993. Based on the date that the Commission received the earliest valid complaint,[15] Wisconsin Operator was required to file a rate justification no later than December 29, 1993.[16] If Wisconsin Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through November 1993.[17] Wisconsin Operator cannot claim an additional inflation adjustment sim-

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deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This complaint was a timely correction of a previous complaint that had been returned by the Commission pursuant to 47 C. F. R. § 76.954. *See* 47 C.F.R. § 76.955. However, on FCC Form 329 the complainant incorrectly entered the date that the complainant mailed the original, returned complaint as the service date of the refiled complaint. Wisconsin Operator has not indicated the service date of the refiled complaint, as required under Section 76.956(a) of our rules. Under these circumstances, we will consider the filing date of the refiled complaint as the service date.

[16] *See* 47 C.F.R. § 76.956(a).

[17] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

ply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Wisconsin Operator should have filed Form 393.[18] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Wisconsin Operator should have used in justifying its rate for CUID No. WI0147, of 1.032.

7. In the other franchise areas addressed in this Order, we have found no apparent errors in Operators' calculation of their maximum permitted rates. However, Operators' actual CPS tier prices in these franchise areas were above the maximum permitted prices that they calculated for the CPS tier. Accordingly, Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which each of the Operators filed:[19]

a. For all of the Connecticut franchise areas addressed in this Order, TCI Cablevision of South Central Connecticut, Inc. ("Connecticut Operator") on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Connecticut Operator used in justifying its rates, of 1.030.

b. For the franchise areas designated by CUID Nos. CO0251, WI0007 and WI0161, Colorado and Wisconsin Operators on their amended Form 393 calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Colorado and Wisconsin Operators used in justifying their rates, of 1.034.

8. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[20]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[21] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file reports with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing their plans to implement the refunds within 60 days of Commission approval of the plans.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communitiesx listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[22]

13. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

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[18] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[19] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[20] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[21] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[22] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

## Appendix A

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| CO0051 | 2/25/94 | 2/25/94 |
| CO0077 | 2/25/94 | 2/25/94 |
| CO0136 | 1/11/94 | 1/4/94 |
| CO0138 | 2/25/94 | 2/25/94 |
| CO0140 | 2/25/94 | 2/25/94 |
| CO0142 | 1/26/94 | 1/19/94 |
| CO0143 | 2/25/94 | 2/25/94 |
| CO0146 | 2/25/94 | 2/25/94 |
| CO0147 | 2/25/94 | 2/25/94 |
| CO0161 | 2/25/94 | 2/25/94 |
| CO0196 | 2/25/94 | 2/25/94 |
| CO0225 | 2/25/94 | 2/25/94 |
| CO0251 | 12/22/93 | 11/9/93 |
| CT0064 | 9/2/93 | 8/31/93 |
| CT0065 | 9/2/93 | 8/31/93 |
| CT0066 | 9/2/93 | 8/31/93 |
| CT0067 | 9/2/93 | 8/31/93 |
| CT0068 | 9/2/93 | 8/31/93 |
| CT0069 | 9/2/93 | 8/31/93 |
| CT0070 | 9/2/93 | 8/31/93 |
| WI0007 | 2/28/94 | 2/28/94 |
| WI0058 | 10/15/93 | 9/9/93 |
| WI0147 | 11/29/93 | 11/29/93 |
| WI0161 | 12/23/93 | 12/20/93 |

## Appendix B

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| CO0051 | $11.08 | $10.26 |
| CO0077 | $11.08 | $10.26 |
| CO0136 | $11.08 | $10.26 |
| CO0138 | $11.08 | $10.26 |
| CO0140 | $11.08 | $10.26 |
| CO0142 | $11.08 | $10.26 |
| CO0143 | $11.08 | $10.26 |
| CO0146 | $11.08 | $10.26 |
| CO0147 | $11.08 | $10.26 |
| CO0161 | $11.08 | $10.26 |
| CO0196 | $11.08 | $10.26 |
| CO0225 | $11.08 | $10.26 |
| CO0251 | $10.10 | $ 9.88 |
| CT0064 | $12.49 | $12.21 |
| CT0065 | $ 9.95 | $ 9.70 |
| CT0066 | $ 9.95 | $ 9.70 |
| CT0067 | $12.49 | $12.21 |
| CT0068 | $12.49 | $12.21 |
| CT0069 | $12.49 | $12.21 |
| CT0070 | $ 9.95 | $ 9.70 |
| WI0007 | $11.43 | $10.86 |
| WI0058 | $10.53 | $10.27 |
| WI0147 | $10.53 | $10.29 |
| WI0161 | $10.53 | $10.31 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| TCI Cablevision of California, Inc. | CUID No. CA0100 (Freemont) |
| American Cable TV Investors 4, Ltd. | CUID No. CA0950 (Colton) |
| TCI Cablevision of Colorado, Inc. | CUID Nos. CO0134 (Douglas County Area), CO0205 (Parker) and CO0210 (Castle Rock) |
| TCI Cablevision of New Castle County, Inc. | CUID Nos. DE0011 (New Castle) and DE0013 (Wilmington) |
| TCI Cablevision of Galesburg, Inc. | CUID No. IL0132 (Galesburg) |
| TCI of Illinois, Inc. | CUID No. IL0657 (Skokie) |
| TCI of Kansas, Inc. | CUID No. KS0067 (Ottawa) |
| TCI Cablevision of Asheville, Inc. | CUID No. NC0032 (Asheville) |
| TCI of Pennsylvania, Inc. | CUID No. PA0643 (North Huntington) |
| TCI TKR of the Metroplex, Inc. | CUID No. TX0553 (Grand Praire) |

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 4, 1995; Released: May 11, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Form 393s in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

5. The actual CPS tier price of TCI Cablevision of Colorado, Inc. ("Colorado Operator") was above the maximum permitted price that it calculated for the CPS tier; thus, Colorado Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Upon review of Colorado Operator's submission we have found that Colorado Operator has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Colorado Operator's calculations in its Form 393:

a. Colorado Operator incorrectly calculated its benchmark rate as of September 30, 1992 on Form 393, Part II, Worksheet 2, Line 220. The instructions to Form 393 permit an operator to calculate its benchmark channel rates using either the benchmark formula or the benchmark tables. However, the benchmark figure that Colorado Operator entered on Line 220 does not agree with the number of regulated channels, satellite channels, and subscribers reported by Colorado Operator using either method. Accordingly, we changed Line 220 to 0.669, the figure yielded by the benchmark formula using the information that Colorado Operator reported.

b. Because Colorado Operator has not demonstrated that its price was reasonable, we must also recalculate the Inflation Adjustment Factor using the most accurate data currently available for the date for which Colorado Operator filed.[12] On its amended Form 393, Colorado Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Colorado Operator used in justifying its rate, of 1.030.

6. For the rest of the franchise areas considered in this Order, we have found no apparent errors in Operators' calculation of their maximum permitted rates. However, Operators' actual CPS tier prices were above the maximum permitted prices that Operators calculated for the CPS tier. Accordingly, Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operators filed:[13]

For the rest of the franchise areas considered in this Order, Operators on their amended Form 393s calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operators used in justifying their rates, of 1.030.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[14]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[15] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file reports with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing their plans to implement the refunds within 60 days of Commission approval of the plans.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per

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[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] *Id.*

[14] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[16]

12. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| CA0100 | 10/25/93 | 10/19/93 |
| CA0950 | 2/24/94 | 2/24/94 |
| CO0134 | 2/25/94 | 2/25/94 |
| CO0205 | 1/14/94 | 1/10/94 |
| CO0210 | 2/25/94 | 2/25/94 |
| DE0011 | 10/6/93 | 9/27/93 |
| DE0013 | 11/22/93 | 11/19/93 |
| IL0132 | 9/20/93 | 9/14/93 |
| IL0657 | 2/8/94 | 2/1/94 |
| KS0067 | 10/12/93 | 10/7/93 |
| NC0032 | 10/5/93 | 9/27/93 |
| PA0643 | 10/26/93 | 10/22/93 |
| TX0553 | 9/15/93 | 9/7/93 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| CA0100 | $9.52 | $9.33 |
| CA0950 | $9.36 | $8.42 |
| CO0134 | $10.90 | $10.27 |
| CO0205 | $10.90 | $10.27 |
| CO0210 | $10.90 | $10.27 |
| DE0011 | $12.47 | $12.34 |
| DE0013 | $12.47 | $12.34 |
| IL0132 | $9.31 | $9.03 |
| IL0657 | $10.85 | $10.62 |
| KS0067 | $11.87 | $10.93 |
| NC0032 | $11.17 | $10.84 |
| PA0643 | $11.34 | $11.22 |
| TX0553 | $9.84 | $9.39 |

[16] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

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| TCI Cablevision of Northwestern Connecticut, Inc. | CUID Nos. CT0078 (Canaan), CT0079 (Salisbury), CT0080 (Cornwall), CT0081 (Sharon), CT0082 (North Canaan) and CT0083 (Norfolk) |
| TCI Cablevision of Central Connecticut, Inc. | CUID Nos. CT0126 (Avon), CT0127 (Burlington), CT0146 (Ellington), CT0147 (Tolland), CT0148 (Vernon), CT0149 (Bolton), CT0150 (Hebron), CT0151 (Andover) and CT0152 (Marlborough) |
| TCI Cablevision of St. Louis, Inc. | CUID No. MO0545 (St. Louis) |
| TCI Cablevision of Utah, Inc. | CUID Nos. UT0009 (Salt Lake County) and UT0088 (West Valley City) |

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 4, 1995; Released: May 11, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings, most recently on May 18, 1994 for the Utah franchise areas, May 31, 1994 for the Missouri franchise area and on June 21 and 24, 1994 for the Connecticut franchise areas.[11]

5. In the case of the Utah franchise areas, the actual CPS tier price of TCI Cablevision of Utah, Inc. ("Utah Operator") was above the maximum permitted price that it calculated for the CPS tier and, thus, Utah Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Upon review of Utah Operator's submission we have found that Utah Operator has not correctly cal-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

culated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Utah Operator's calculations in its Form 393:

a. Utah Operator incorrectly calculated its benchmark rate as of the initial date of regulation on Form 393, Part II, Worksheet 1, Line 121. The instructions to Form 393 permit an operator to calculate its benchmark channel rate using either the benchmark formula or the benchmark tables. However, the benchmark figure that Utah Operator entered on Line 121 does not agree with the numbers of regulated channels, satellite channels, and subscribers reported by Utah Operator using either method. Accordingly, we changed Line 121 to 0.676, the figure yielded by the benchmark formula using the information that Utah Operator reported.

b. Because Utah Operator has not demonstrated that its price in these franchise areas was reasonable, we must also recalculate the Inflation Adjustment Factor using the mostx accurate data currently available for the date for which Utah Operator filed.[12] On its amended Form 393, Utah Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Utah Operator used in justifying its rate, of 1.034.

6. For the Connecticut franchise areas designated by CUID Nos. CT0078 through CT0083, TCI Cablevision of Northwestern Connecticut, Inc. ("Northwestern Connecticut Operator") asserts that its monthly CPS tier price is justified by its benchmark filing because the price is less than the maximum permitted rate that it calculated on its Form 393. Upon review of Northwestern Connecticut Operator's submission for these franchise areas, we have found that Northwestern Connecticut Operator has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Northwestern Connecticut Operator's calculations in its Form 393:

a. Northwestern Connecticut Operator incorrectly calculated its benchmark rates as of the initial date of regulation and as of September 30, 1992 on Form 393, Part II, Worksheet 1, Line 121 and Worksheet 2, Line 220. The instructions to Form 393 permit an operator to calculate its benchmark channel rates using either the benchmark formula or the benchmark tables. However, the benchmark figures that Northwestern Connecticut Operator entered on Lines 121 and 220 do not agree with the numbers of regulated channels, satellite channels, and subscribers reported by Northwestern Connecticut Operator using either method. Accordingly, we changed Line 121 to 0.758 and Line 220 to 0.803, the figures yielded by the benchmark formula using the information that Northwestern Connecticut Operator reported.

b. Because of these errors, Northwestern Connecticut Operator has failed to demonstrate that its price in these franchise areas was not unreasonable. Therefore, we must also recalculate the Inflation Adjustment Factor using the most accurate data currently available for the date for which Northwestern Connecticut Operator filed.[13] On its amended Form 393, Northwestern Connecticut Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Northwestern Connecticut Operator used in justifying its rate, of 1.030.

7. For the Connecticut franchise areas designated by CUID Nos. CT0126 and CT0127 and CT0146 through CT0152, we have found no apparent errors that affect the calculation by TCI Cablevision of Central Connecticut, Inc. ("Central Connecticut Operator") of its maximum permitted rates.[14] However, Central Connecticut Operator's actual CPS tier prices in these franchise areas were above the maximum permitted prices that Central Connecticut Operator calculated for the CPS tier. Accordingly, Central Connecticut Operator has failed to demonstrate that its prices for the CPS tier were not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Central Connecticut Operator filed:[15] For these Connecticut franchise areas Central Connecticut Operator on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] For the franchise areas designated by CUID Nos. CT0146 through CT0152, Central Connecticut Operator on Line 202, Worksheet 2, Part II of Form 393 entered 29 basic tier channels and 17 CPS tier channels. Our review of Central Connecticut Operator's September 1992 channel line-up, which it provided with its Form 1200, reveals 28 basic tier channels and 18 CPS tier channels. Accordingly, we have changed Central Connecticut Operator's Line 202 entries. This change, however, does not affect Central Connecticut Operator's calculation of its maximum permitted rate.

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

an Inflation Adjustment Factor through October 1993, the base date Central Connecticut Operator used in justifying its rates, of 1.030.

8. For the Missouri franchise area designated by CUID No. MO0545, we have found no apparent errors in the calculation by TCI Cablevision of St. Louis, Inc. ("St. Louis Operator") of its maximum permitted rate. However, St. Louis Operator's actual CPS tier price was above the maximum permitted price that St. Louis Operator calculated for the CPS tier. Accordingly, St. Louis Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which St. Louis Operator filed:[16] For the Missouri franchise area St. Louis Operator on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date St. Louis Operator used in justifying its rate, of 1.030.

9. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[17]

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in thex caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[18] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

12. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file reports with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing their plans to implement the refunds within 60 days of Commission approval of the plans.

13. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[19]

14. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| CT0078 | 9/2/93 | 8/31/93 |
| CT0079 | 9/2/93 | 8/31/93 |
| CT0080 | 9/2/93 | 8/31/93 |
| CT0081 | 9/2/93 | 8/31/93 |
| CT0082 | 9/2/93 | 8/31/93 |
| CT0083 | 9/2/93 | 8/31/93 |
| CT0126 | 9/3/93 | 9/1/93 |
| CT0127 | 9/3/93 | 9/1/93 |
| CT0146 | 9/3/93 | 9/1/93 |
| CT0147 | 9/3/93 | 9/1/93 |
| CT0148 | 9/3/93 | 9/1/93 |
| CT0149 | 9/3/93 | 9/1/93 |
| CT0150 | 9/3/93 | 9/1/93 |
| CT0151 | 9/3/93 | 9/1/93 |
| CT0152 | 9/3/93 | 9/1/93 |
| MO0545 | 10/4/93 | 9/30/93 |
| UT0009 | 1/24/94 | 1/19/94 |
| UT0088 | 2/28/94 | 2/28/94 |

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[19] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

## Appendix B

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| CT0078 | $13.52 | $13.37 |
| CT0079 | $13.52 | $13.37 |
| CT0080 | $13.52 | $13.37 |
| CT0081 | $13.52 | $13.37 |
| CT0082 | $13.52 | $13.37 |
| CT0083 | $13.52 | $13.37 |
| CT0126 | $11.52 | $11.34 |
| CT0127 | $11.52 | $11.34 |
| CT0146 | $12.07 | $11.74 |
| CT0147 | $12.07 | $11.74 |
| CT0148 | $12.07 | $11.74 |
| CT0149 | $12.07 | $11.74 |
| CT0150 | $12.07 | $11.74 |
| CT0151 | $12.07 | $11.74 |
| CT0152 | $12.07 | $11.74 |
| MO0545 | $11.16 | $10.67 |
| UT0009 | $10.83 | $10.48 |
| UT0088 | $10.83 | $10.48 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Cablevision of New York — CUID No. NY0190 (South Hampton)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 4, 1995; Released: May 11, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tiers in the community designated above. Operator has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on OperatorP and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 on November 26, 1993.[11]

5. Operator asserts that its monthly prices for its CPS tiers are justified by its benchmark filing because its prices are lower than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedule A of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in the column, Operator confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. Also, Operator failed to include federal taxes in Column G of Schedule C for its customer leased equipment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of return on

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"),* the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended,* 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration,* 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration,* 9 FCC Rcd at 4189 n.195.

[11] Operator submitted its FCC Form 393 on November 26, 1993 in response to a complaint that was filed on October 27, 1993. However, this complaint was returned by the Commission on November 24, 1993 pursuant to 47 C.F.R. § 76.954. 5

[12] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

equipment and installations and thereby could increase its CPS price. We therefore recalculated Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Because of this error, Operator has failed to demonstrate that its prices for the CPS tiers were not unreasonable. Therefore, we must recalculate the Inflation Adjustment Factor on Form 393, Part II, Worksheet 1 on the basis of the most accurate data currently available for the date for which Operator filed.[13] In its FCC Form 393 filing, Operator calculated its Inflation Adjustment Factor as of the end of September 1993 using data released by the U.S. Department of Commerce on August 31, 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993 for the franchise area addressed in this Order.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in the franchise area (as set forth in Appendix A) to May 14, 1994.[14]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referenced in Appendix A against the cable programming service prices charged by Operator in South Hampton, New York, and all other complaints in this franchise area relating to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in the franchise area (as set forth on Appendix A)[15] to May 14, 1994 which exceeded the maximum prices for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein, for the period beginning May 15, 1994, to reduce the monthly charges per tier as of March 31, 1994 for Tiers 2 and 3, (lines A6b and A6c) to equal the maximum prices in the franchise area set forth in Appendix B (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| NY0190 | 12/15/93 | 12/11/93 |

**Appendix B**

| CUID No. | Tier | Actual Rates | Maximum Permitted Rates |
|---|---|---|---|
| NY0190 | 2 | $15.94 | $15.21 |
| | 3 | $ 2.17 | $ 2.07 |

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| TCI of Eastern Iowa, Inc. | CUID No. IA0090 (Iowa City) |
| TCI of Indiana, Inc. | CUID No. IN0011 (Richmond) |
| TCI of Evansville, Inc. | CUID No. IN0438 (Evansville) |
| TCI Cablevision of Nevada, Inc. | CUID No. NV0006 (Reno) |

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 4, 1995; Released: May 11, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that TCI of Indiana, Inc. ("Indiana Operator"), TCI of Evansville, Inc. ("Evansville Operator"), TCI of Eastern Iowa ("Eastern Iowa Operator") and TCI Cablevision of Nevada, Inc. ("Nevada Operator") (collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings, most recently on May 27, 1994 for CUID Nos. IN0011, IN0438, and NV0006, and on June 2, 1994 for CUID No. IA0090.[11]

5. For one of the communities at issue in this Order, Operator's actual CPS tier price was above the maximum permitted price that it calculated for the CPS tier and, thus, Operator failed to demonstrate that its price for the CPS tier was not unreasonable.[12] For other communities, Operators' prices were at or below their calculated maximum permitted prices. Upon review of Operators' submissions, we have found that in every case they miscalculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Form 393s:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] For CUID No. IN0438, TCI of Evansville, Inc. calculated a maximum permitted price of $12.21 per month. It was actually charging, however, $12.72 per month.

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[13] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[14] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[15] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[16] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $4.80 to $15.95. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[17] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[18] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[19]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[20] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[21] We have further determined that in order to

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[13] 47 U.S.C. § 543(b)(3).

[14] 47 C.F.R. § 76.923(b).

[15] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[16] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[17] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19-20 (Cab. Serv. Bur., released Feb. 7, 1995).

[18] Operators' calculated hourly service charge in these communities ranges from $20.10 to $25.88.

[19] If, as in other communities, Operators are charging a wire maintenance fee, we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[20] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[21] *Cf.* United Video Cablevision, Inc ., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[22] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. On its Form 393 filing for CUID No. NV0006, Nevada Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of March 1994. However, Nevada Operator cannot permissibly calculate inflation through the end of March 1994. Based on the service date of the earliest valid complaint, Nevada Operator was required to file a rate justification no later than November 26, 1993.[23] If Nevada Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[24] Nevada Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Nevada Operator should have filed Form 393.[25] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Nevada Operator should have used in justifying its rate for CUID No. NV0006, of 1.030.

f. Because the Evansville and Iowa Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, we will set maximum permitted prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Evansville and Iowa Operators filed.[26] On their amended Form 393s for CUID Nos. IN0438 and IA0090, Evansville and Iowa Operators calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Evansville and Iowa Operators used in justifying their rates, of 1.030.

g. On its amended Form 393 for CUID No. IN0011, Indiana Operator calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Indiana Operator used in justifying its rate, of 1.034.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[27]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[28] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

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[22] This adjustment to Worksheet 1 has the effect of causing Operators in some communities to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. For CUID Nos. IN0011 and IA0090, however, Indiana and Iowa Operators did not complete Worksheet 2 of Form 393. For these franchise areas, therefore, we have computed Worksheet 2 by using data supplied by Indiana and Iowa Operators on their Form 1200 filings.

[23] *See* 47 C.F.R. § 76.956(a).

[24] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[25] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[26] *Id.*

[27] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[28] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

9. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[29]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| IA0090 | 10/12/93 | 10/6/93 |
| IN0011 | 12/9/93 | 12/6/93 |
| IN0438 | 2/25/94 | 2/25/94 |
| NV0006 | 11/2/93 | 10/26/93 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| IA0090 | $11.12 | $11.02 |
| IN0011 | $ 9.25 | $ 8.70 |
| IN0438 | $12.72 | $11.91 |
| NV0006 | $11.26 | $11.15 |

[29] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**IC Docket No. 94-31**

In the Matter of

Preparation for International
Telecommunication Union World
Radiocommunication Conferences

**ORDER**

**Adopted: April 27, 1995; Released: April 27, 1995**

By the Chief, International Bureau:

1. CTA Commercial Systems, Inc., E-SAT, Inc., Final Analysis Communication Services, Inc., GE American Communications, Inc., Leo One USA Corporation, Orbital Communications Corporation, and STARSYS Global Positioning, Inc., request an extension of time of thirty days or until May 15, 1995, to file supplemental reply comments in response to the *Second Notice of Inquiry*[1] in this proceeding. By a previous order, the deadline for reply comments was extended from March 21 to April 14, 1995.[2]

2. Movants are applicants or licensees to construct and operate non-voice non-geostationary mobile satellite service (NVNG MSS) systems. They state that the additional time is needed to complete on-going field tests and sharing studies that will provide information on the suitability of certain frequency bands for use by NVNG MSS. This information, they assert, would assist the Commission in preparing proposals for international allocations for NVNG MSS at the upcoming World Radiocommunication Conference (WRC-95).[3]

3. This proceeding solicits public comment on a broad range of issues to support the Commission's preparations for WRC-95 which will be convened by the International Telecommunication Union (ITU) in Geneva, Switzerland, on October 23, 1995. The result of this proceeding will be the Commission's recommended U.S. proposals for WRC-95. These recommended proposals will be considered by the National Telecommunications and Information Administration (NTIA) and the Department of State in adopting final U.S. proposals for the conference. Final U.S. proposals need to be submitted to the ITU in Geneva at the end of June in order to meet the ITU's schedule for timely submitted proposals.

4. As we noted in the previous Order, the Bureau is committed to completing this proceeding on a timely basis and, in light of the rapidly approaching ITU proposal deadline, we stated that we could not consider any further extensions. We recognize, however, the importance of the continuing work of the NVNG MSS proponents and its potential to assist the U.S. in formulating proposals for MSS allocations below 1 GHz. Thus, although we will deny the motion for extension of time, we will informally consider late supplemental comments should they be received before the proposals are final.

5. Accordingly, the motion for an extension of time IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[1] *Second Notice of Inquiry* in IC Docket No. 94-31, 60 Fed. Reg. 8894 (Feb. 16, 1995).
[2] *Order*, DA 95-421, 60 Fed. Reg. 15,527 (Mar. 24, 1995).
[3] These studies are also being considered by the WRC-95 Industry Advisory Committee.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CENTURY CABLE OF
NORTHERN CALIFORNIA

Appeal of Local Rate
Orders of the City of
Albany, California

**ORDER**

**Adopted: April 26, 1995; Released: April 27, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On March 8, 1995, Century Cable of Northern California ("Century"), filed with the Commission an appeal of two local rate orders adopted by the City of Albany California ("City") on February 6, 1995.[1] The City opposes Century's appeal.[2] In the two local orders, the City established Century's rates for basic cable service, equipment, installations and hourly service charges.[3] As part of these decisions setting Century's basic tier rates, the City found Century's package offering ("Century Select" package) of certain individually offered ("a la carte") channels to be a regulated tier of service and, therefore, included those channels as regulated channels for purposes of the local orders. In the first local rate order, the City ordered Century to make refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through July 14, 1994 in reference to the Form 393 filing by Century. In the second local rate order, the City ordered Century to make refunds to subscribers for all payments made in excess of the rates set forth in the local order dating back to July 15, 1994 in reference to the Form 1200 filing by Century.

2. The FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until July 14, 1994.[4] The FCC Form 1200 series are the official forms used to determine whether regulated rates for programing, equipment and installations are reasonable under the revised benchmark rules which apply to Century beginning July 15, 1994.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] The Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[9]

## II. DISCUSSION

4. Century objects to the City's finding that the channels comprising its Select Century a la carte package (consisting of CNN, Turner Network Television, and The Discovery Channel) must be considered a rate regulated offering. Century argues that the facts are essentially indistinguishable from the facts in several of our Letter of Inquiry decisions in which we held that an a la carte package may

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[1] The first local rate order adopted by the City, Resolution No. 95-9, applied to Century's rates for the period of time between September 1, 1993 until July 14, 1994. The second local rate order adopted by the City, Resolution No. 95-10, applied to Century's rates after July 14, 1994.

[2] The City filed its opposition on April 19, 1995, which is 27 days past the deadline under our rules for such a filing. *See* 47 C.F.R. § 76.944(b). The City offered no explanation why its opposition was late other than to state that it is a small city with limited resources. We will reject the City's opposition for its failure to show "good cause." *See* Meredith/New Heritage Strategic Partners, L.P., 9 FCC Rcd 6841 (1994). We note that the City's opposition, even if timely filed, would not have affected the outcome of this appeal.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 (*"1992 Cable Act"*) Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b) (1992) and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[4] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994) (*"Second Recon. Order"*), as Century has done, the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the Century implemented its new rates, as determined under the Form 1200 series.

[5] 47 C.F.R. § 76.944 (1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5837 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[7] *Id.*

[8] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[9] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

be deemed a new product tier and should not be treated as a rate regulated tier for purposes of calculating a system's basic rate.[10]

5. The Century a la carte package at issue was first offered to subscribers on September 1, 1993, when Century restructured the service offerings on its system which serves the City. Century states that its September 1, 1993 restructuring involved offering three channels that previously had been offered on its former cable programming service tier on an individual basis and also as a package that Century alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Dimension Cable Services, Oceanside, California,* 10 FCC Rcd 7311 (Cab. Serv. Bur. 1994). In *Dimension Cable Services,* we found we could not say that it was clear that the Preferred Dimension package offered by Dimension on its Oceanside, California system was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject Dimension to refund liability or to require Dimension to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, the Preferred Dimension package may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Sixth Order on Reconsideration, MM Docket No. 93-286, Fifth Report and Order,* 10 FCC Rcd 1226 (1995) ("*Going Forward Order*").[11]

7. We find that the City's determination in its local rate orders that the channels comprising Century's a la carte package must be included as regulated channels is inconsistent with the action taken in *Dimension Cable Services.* We further find that, in accordance with *Dimension Cable Services,* Century's a la carte package should not be treated as a rate-regulated tier of service. Century's a la carte package should be treated as a new product tier. Accordingly, Century's appeal on this issue is granted and we remand the local rate order to the City for further proceedings consistent with this ruling.

## III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that Century's appeal, with respect to the issue of the regulatory status of its a la carte package issue IS GRANTED. IT IS FURTHER ORDERED that Century's appeal, with respect to this issue, IS REMANDED to the City for resolution in accordance with the terms of this Order.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[10] Century cites Century Cable TV (Huntington, WV), LOI 93-49, DA 94-1314 (Cab. Serv. Bur., rel. Nov. 25, 1994). *See also Rate Order,* 8 FCC Rcd at 5836-5838.

[11] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order,* 10 FCC Rcd at 1233-38. In the *Going Forward Order,* the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 94-157**

In the Matter of

The NYNEX Telephone Companies — Transmittal No. 374

Tariff F.C.C. No. 1

## MEMORANDUM OPINION AND ORDER SUSPENDING RATES

**Adopted: April 27, 1995; Released: April 27, 1995**

By the Chief, Tariff Division, Common Carrier Bureau:

### I. INTRODUCTION

1. On April 14, 1995, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 374 to increase its premium, transitional, and directory assistance interconnection charges. On April 20, 1995, MCI Telecommunications Corporation (MCI) and Frontier Communications International Inc. (Frontier) filed petitions to suspend and investigate the transmittal.[1] NYNEX filed a reply on April 25, 1995. Transmittal No. 374 is scheduled to become effective on April 28, 1995. For the reasons given below, we suspend NYNEX Transmittal No. 374 and include it in our investigation in CC Docket No. 94-157.[2]

### II. BACKGROUND

2. The investigation in CC Docket No. 94-157 was initiated in December 1994 to consider the local exchange carriers' (LECs') requests for exogenous treatment of the costs associated with implementation of Statement of Financial Accounting Standards-106 (SFAS-106), "Employers Accounting for Postretirement Benefits Other Than Pensions." In that proceeding, a number of LECs sought to adjust their price cap index (PCI) levels to reflect implementation of SFAS-106 since the United States Court of Appeals decision in *Southwestern Bell Telephone Company v. FCC*, 28 F. 3d 165 (D.C. Cir. 1994). In that case, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded a Commission Order which concluded that increases in booked Other Postretirement Employee Benefits (OPEB) costs caused by the implementation of SFAS-106 were not eligible for exogenous treatment.[3] SFAS-106 requires companies to account for OPEBs on an accrual basis, treating OPEBs as a form of deferred compensation earned by employees during their working years. Accordingly, the costs of OPEBs are recognized during the years the benefits are earned, rather than during the years when the amounts of benefits are actually paid by the company. In addition, SFAS-106 requires companies to recognize on their books the amount of their unfunded obligation for OPEBs to retirees and to active employees as of the date of their adoption of SFAS-106. This obligation is known as the Transitional Benefit Obligation (TBO).[4]

3. While it is clear that after the *Southwestern Bell* decision, *supra*, changes in LEC OPEB costs caused by the implementation of SFAS-106 are eligible for exogenous treatment, other issues remain that concern the specific adjustments that LECs may make to their PCI levels to reflect the cost change. Those issues are now under investigation in CC Docket No. 94-157.

### III. PLEADINGS

#### A. The Transmittal

4. In this transmittal, NYNEX is proposing to increase its interconnection charges for the following rate elements: (1) premium rate per minute of use; (2) transitional rate per minute of use and; (3) directory assistance per call. NYNEX contends that this is a within cap-within band filing. In addition, NYNEX states that the proposed rate increase is possible due to, among other things, the headroom created as a result of its OPEB filing in NYNEX Transmittal No. 328.[5]

#### B. MCI's Petition

5. MCI states that NYNEX Transmittal No. 374 should be suspended and investigated because it takes advantage of a PCI level that is already under investigation in the *SFAS-106 Investigation Order, supra*. According to MCI, NYNEX Transmittal No. 374 uses pricing flexibility created in December 1994 when NYNEX claimed exogenous cost treatment of the accounting charges for OPEBs. MCI maintains that OPEBs create an accounting obligation that must be

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[1] In addition, Empire Association of Long Distance Telephone Companies, Inc. (Empire) filed a letter in support of Frontier's Petition. Letter from Emilio Petroccione, Counsel for Empire, to Secretary, FCC, April 19, 1995.

[2] Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690, *et al*, CC Docket No. 94-157, Memorandum Opinion and Order, DA 94-1613 (Tariff. Div. Com. Car. Bur., rel. Dec. 29, 1994) (*SFAS-106 Suspension Order*).

[3] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers' Accounting for Postretirement Benefits Other Than Pensions," CC Docket No. 92-101, Suspension and Investigation Order, 7 FCC Rcd 2724 (Com. Car. Bur. 1992), Memorandum Opinion and Order, 8 FCC Rcd 1024 (1993) (*OPEB Order*).

[4] TBOs were created as a result of both the change from cash-based to accrual accounting and the SFAS-106 requirement that companies recognize on their books the amount of their unfunded obligation for OPEBs to retirees and to active employees existing as of the date of their adoption of SFAS-106. This unfunded obligation reflects the amount that a company would have accrued on its books as of the effective date of the accounting change if it had been operating under the accrual method. *SFAS-106 Suspension Order*, at para. 7.

[5] NYNEX Transmittal No. 374, Description and Justification (D&J) at 3-4.

recognized on the books of companies, including LECs.[6] In addition, MCI states that the Commission has also established that LEC tariffs that take advantage of the suspect PCIs are subject to suspension and investigation.[7] MCI argues that this transmittal should also be suspended and investigated.[8]

6. MCI further contends that the Commission has recently ordered the LECs to reduce their interconnection charges in the Report and Order in the LEC price cap performance review proceeding.[9] As a result of that Order, NYNEX will be required to lower its PCI and to delete all effects of the accounting change for OPEBs, according to MCI.[10] MCI contends that NYNEX is attempting to raise the interconnection charges just for the few months that remain before the new rules go into effect. MCI states that this unreasonable action warrants suspension and investigation.[11]

**C. Frontier's Petition**

7. Frontier maintains that NYNEX is proposing a last-minute price increase in interconnection charges to offset the impending price decreases ordered by the Commission in the *LEC Price Cap Performance Review Order*. According to Frontier, NYNEX is attempting to raise prices for its captive interstate access customers.[12]

**D. NYNEX Reply**

8. In its reply, NYNEX states that the proposed rates are all within the price cap limits and service band limits. While NYNEX concedes that the *LEC Price Cap Performance Review Order* requires NYNEX to make a one-time reduction in its PCIs in the 1995 annual access tariff filing to adjust the past productivity factor and to remove ongoing effects of "noneconomic" exogenous cost changes for OPEBs, the Commission made it clear that these reductions are only on a prospective bases.[13] According to NYNEX, the Commission stated in that Order that it did not seek to reclaim OPEB revenues obtained at that time under the LECs' filed tariffs because those rates are subject to the pending investigation in CC Docket No. 94-157. The Commission further stated, according to NYNEX, that the lawfulness of those tariffs will be determined by the rule in effect when the tariffs were filed.[14]

## IV. DISCUSSION

9. We have reviewed NYNEX Transmittal No. 397, the supporting documents, and pleadings. We find that the issues raised by this transmittal are the same as the issues under investigation in CC Docket No. 94-157. As indicated above, NYNEX states that it is proposing to increase its interconnection charges to reflect the headroom created by the exogenous cost treatment for OPEBs. While the Court has ordered the Commission to grant exogenous treatment of these postemployment benefits, the question of the specific amount eligible for exogenous treatment is subject to investigation in CC Docket No. 94-157. Therefore, we are suspending the transmittal and including the issues presented therein in CC Docket No. 94-157.

## V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revised rates set forth in NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 374, IS SUSPENDED for one day from the current effective date and an investigation of those rates is included in CC Docket Nos. 94-157. The NYNEX Telephone Companies SHALL FILE supplements reflecting this suspension no later than five days from the release of this Order and should cite the "DA number" of this Order as the authority for making this tariff filing.

11. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204 (a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the NYNEX Telephone Companies SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the rates that are the subject of this investigation.

12. IT IS FURTHER ORDERED that the NYNEX Telephone Companies SHALL INCLUDE STATEMENTS in all subsequent transmittals revising rates indicating whether, and to what extent, the price change is predicated upon the exogenous cost claim related to OPEBs.[15]

13. IT IS FURTHER ORDERED that the petitions to suspend and investigate NYNEX Telephone Companies Transmittal No. 374 filed by MCI Telecommunications Corporation and Frontier Communications International, Inc. ARE GRANTED to the extent discussed above.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

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6 *SFAS-106 Investigation Order, supra* at paras. 6-8.

7 Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 747, Memorandum Opinion and Order Suspending Rates, DA 95-497 (Tariff Div. Com. Car. Bur., rel. March 15, 1995).

8 MCI Petition at 3.

9 In the Matter of Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, FCC 95-132, (rel. April 7, 1995) (*LEC Price Cap Performance Review Order).*

10 MCI Petition at 5-6.

11 *Id.* at 6.

12 Frontier Petition at 2.

13 *LEC Price Cap Performance Review Order, supra* at paras. 252-53, 309.

14 NYNEX Reply at 2-3.

15 We anticipate that any such transmittals will be suspended for one day, included in this investigation, and made subject to an accounting order.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: May 2, 1995

## CABLE SERVICES BUREAU ANNOUNCES POLICY REGARDING INFLATION ADJUSTMENT ON FORM 393

Under the Commission's rules, cable operators who chose to justify their rates prior to May 15, 1994 using the benchmark methodology were required to use FCC Form 393. Part II, Worksheet 1 of Form 393 includes an adjustment for inflation between September 30, 1992 and the initial date of regulation. The instructions to Form 393 direct that the inflation adjustment be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." The Commission's rules generally require an operator to file a justification of its cable programming service (CPS) rates within 30 days after it is served with a complaint about those rates, unless the operator has been notified that the complaint was returned by the Commission.47 C.F.R. § 76.956(a). Thus, the latest date through which the inflation adjustment may be calculated is the end of the month preceding the 30th day after service of the earliest accepted complaint.

By an order released July 27, 1993, the Commission extended the 30-day deadline for rate justifications in a limited class of cases. 58 *Fed. Reg.* 41,042 (Aug. 2, 1993). Specifically, in recognition of the tight schedule on which the Commission's rate regulations were adopted and became effective, the Commission extended the filing deadline until November 15, 1993 for complaints that were served on or before October 15, 1993. This extension was merely a procedural extension of time to file the Form 393, not permission to justify rate calculations that gave effect to events occurring after the date of the complaint, and the text of the order granting the extension made clear that the extension would not permit rate increases nor harm consumers. Thus, the extension order did not contemplate an increase in the permissible inflation adjustment; it merely extended the time for submitting a completed Form 393.

Nonetheless, it is apparent that some operators interpreted the extension, combined with the Form 393 instruction quoted above, as permitting them to claim an inflation adjustment through October 1993 in all cases. As stated above, this interpretation is incorrect. However, operators could reasonably and in good faith have misunderstood the effect of the extension. Furthermore, in most cases the effect on the permitted rate of calculating the inflation adjustment through October rather than September 1993 will be very small. Therefore the Bureau will accept October 1993 as the ending date of the inflation adjustment for all operators that were required to file a rate justification on November 15, 1993. If the operator's inflation adjustment calculation through October 1993 was otherwise correct and it justified its rates using its inflation calculation, the operator's calculation will be accepted. If the operator made other errors in calculating the inflation adjustment or if it did not justify its rates, the Bureau will recalculate the inflation adjustment through October 1993 using data released by the U.S. Department of Commerce on July 29, 1994.

In some past orders the Bureau has not permitted operators that were served with a complaint in September 1993 to calculate the inflation adjustment through October 1993. In such cases, the operator will be permitted to calculate its refund using inflation adjusted through October 1993 when its refund plan is considered. Any affected operator that has already filed a refund plan without raising this issue may amend its refund plan within 30 days of the date of this Public Notice. To the extent that the date through which the inflation adjustment is calculated may affect an operator's permitted rate under Form 1200, that impact will be considered when its Form 1200 filing is reviewed.

Consistent with Section 76.922(b)(9) of the Commission's rules and paragraph 94 of the Third Order on Reconsideration, MM Docket Nos. 92-262 and 92-266, FCC 94-40, 9 FCC Rcd 4316 (1994), refunds or rate reductions are not ordered due solely to changes in inflation data between the time the operator completed Form 393 and the date of our analysis. Inflation data is updated in cases where a refund or rate reduction is otherwise necessary, or where an operator incorrectly calculated the inflation adjustment at the time it filed. However, refunds are not ordered where the amount of any refund per subscriber would be *de minimis*, as is often the case where the operator's only error is in calculating the inflation adjustment.

For information regarding this Public Notice: Cable Service Bureau Contact, Eli Johnson at (202) 416-0800; News Media Contact, Morgan Broman at (202) 416-0852.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 94-60**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8455 |
| Table of Allotments, | RM-8511 |
| FM Broadcast Stations. | |
| (Duncan, Arizona and Reserve, New Mexico)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 4, 1995; Released: August 14, 1995**

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 3051 (1994), issued in response to a request filed on behalf of Duncan Community Radio ("petitioner") proposing the allotment of FM Channel 264A to Duncan, Arizona, as that community's first local aural transmission service. Petitioner filed supporting comments in response to the *Notice*. A counterproposal was filed on behalf of Acme Enterprises ("Acme") requesting the allotment of Channel 264C3 at Reserve, New Mexico,[2] an incorporated community, to which petitioner responded. Responsive comments were also filed by Acme.

2. As stated in the *Notice*, petitioner's proposal is premised on its desire to provide a first local aural transmission service to Duncan. In response to the *Notice*, Acme requested the allotment of Channel 264C3 to Reserve, New Mexico, as that community's first local aural transmission service. The distance between Duncan and Reserve is 115.2 kilometers (71 miles), whereas a distance of 142 kilometers (88 miles) is required in this instance.[3] In its responsive comments, petitioner identified a variety of Class C3 channels that could be allotted to Reserve[4] consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, thus resolving the conflict between the two proposals. Of the channels identified, we have determined that Channel 283C3 is the least restrictive one available to Reserve. Therefore, a comparative analysis of the two proposals is not required.[5]

3. Based upon the expressions of interest in providing a first local transmission service at Duncan, Arizona, and Reserve, New Mexico, we will allot Channel 264A and Channel 283C3, respectively, to those communities. As indicated in the *Notice*, Channel 264A can be allotted to Duncan in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules without a site restriction, at coordinates 32-43-12 and 109-06-12. Channel 283C3 can be allotted to Reserve, New Mexico, without a site restriction at coordinates 33-43-00 and 108-45-24. As Duncan, Arizona, and Reserve, New Mexico, are each located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence of the Mexican government in these allotments was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the communities listed below, as follows:

| City | Channel No. |
|---|---|
| Duncan, Arizona | 264A |
| Reserve, New Mexico | 283C3 |

5. The window period for filing applications for Channel 264A at Duncan, Arizona, and for Channel 283C3 at Reserve, New Mexico, will open on **September 28, 1995** and close on **October 30, 1995**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 264A at Duncan, Arizona, and for Channel 283C3 at Reserve, New Mexico, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of Reserve, New Mexico, has been added to the caption.
[2] Public Notice of the counterproposal was given September 7, 1994, Report No. 2028.
[3] Coordinates used for Channel 264C3 at Reserve are 33-41-51 and 108-46-34.
[4] Specifically, petitioner identified the availability of Class C3 Channels 234-35, 241, 246-48, 259, 273, 278, 283, 285, 287, 289, 291-92, or 297.
[5] As a result of our determination, the responsive comments filed herein will not be discussed.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-37**

In the Matter of

Amendment of Section 73.606(b), RM-8586
Table of Allotments,
TV Broadcast Stations
(Waimanalo, Hawaii)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 4, 1995; Released: August 14, 1995**

By the Chief, Allocations Branch:

1. Pursuant to the request of Joyce Cathcart ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 3877 (1995), proposing the allotment of UHF Television Channel 56 to Waimanalo, Hawaii, (population 3,508) as that community's first local television service. Petitioner filed comments in support of the proposal restating her intention to apply for the channel, if allotted. HTV/HTN/Hawaiian Television Network, Ltd. ("HTVN"), filed comments also stating an intention to apply for Channel 56, if allotted to Waimanalo.

2. HTVN in its comments states that it prefers Channel 56 at Waimanalo to Channel 66 at Kaneho, Hawaii.[1] HTVN recognizes it cannot be the licensee of more than one full power TV station if the Grade B contours of the stations overlap, due to the close proximity of the communities involved in the two proposals. Therefore, HTVN states that it will only apply for Channel 56 at Waimanalo.

3. We believe the public interest would be served by allotting UHF Television Channel 56 to Waimanalo, Hawaii, since it would provide the community with its first local television service. An engineering analysis has determined that UHF Television Channel 56 can be allotted to Waimanalo consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[2] The Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas. However, Waimanalo is not in one of the affected areas.[3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 28, 1995**, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel |
|---|---|
| Waimanalo, Hawaii | 56 |

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. Questions related to the application filing process should be addressed to the Video Services Division, TV Branch, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] *See Report and Order*, MM Docket No. 94-30, 9 FCC Rcd 7199 (1994).

[2] The coordinates for Channel 56 at Waimanalo are North Latitude 21-21-00 and West Longitude 157-43-12.

[3] *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 FR 28346, July 29, 1987.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-38**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Kailua, Hawaii) | RM-8587 |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 4, 1995; Released: August 14, 1995**

By the Chief, Allocations Branch:

1. Pursuant to the request of Paul Alfred Tennyson ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 3879 (1995), proposing the allotment of UHF Television Channel 50 to Kailua, Hawaii, (population 36,818) as that community's first local television service. Petitioner filed comments in support of the proposal restating his intention to apply for the channel, if allotted.

2. We believe the public interest would be served by allotting UHF Television Channel 50 to Kailua, Hawaii, since it could provide the community with its first local television service. An engineering analysis has determined that UHF Television Channel 50 can be allotted to Kailua consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[1] The Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas. However, Kailua is not in one of the affected areas.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS FURTHER ORDERED, That effective **September 28, 1995**, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Kailua, Hawaii | 50 |

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. Questions related to the application filing process should be addressed to the Video Services Division, TV Branch, Mass Media Bureau (202) 418-1630.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 50 at Kailua are North Latitude 21-24-00 and West Longitude 157-44-30.

[2] *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 FR 28346, July 29, 1987.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-63**

In the Matter of

Amendment of Section 73.202(b), RM-8617
Table of Allotments,
FM Broadcast Stations
(Rushville, Illinois)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 4, 1995; Released: August 14, 1995**

By the Chief, Allocations Branch:

1. Pursuant to the request of Larry K. and Cathy M. Price ("petitioners"), licensees of Station WKXQ(FM), Channel 244A, Rushville, Illinois, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 5409 (1995), proposing the substitution of Channel 223A for Channel 244A at Rushville, and the modification of Station WKXQ(FM)'s license accordingly. Petitioners filed comments in support of the proposal reaffirming their intention to apply for the channel, if allotted. No other comments were received.[1]

2. In support of their proposal, petitioners state that the channel substitution will reduce co-channel interference and terrain shielding. Petitioners also note that Station WKXQ(FM) is short-spaced by 7.7 kilometers to Station WCVS(FM), Channel 244A, Virden, Illinois. This situation is due to the revision of the spacing table created in MM Docket No. 88-375, which increased the minimum co-channel Class A spacing from 105 to 115 kilometers. *See Second Report and Order, MM Docket No. 88-375, Amendment of Part 73 of the Rules to provide for an additional FM station class (Class C3) and to increase the maximum transmitting power for Class A FM stations,* 4 FCC Rcd 6375 (1989). Although, Stations WKXQ(FM) and WCVS(FM) have entered into an agreement in which each station has agreed to allow the other to increase power to 6 kilowatts, pursuant to the provisions of 47 CFR, Sec. 73.213(c)(2), the instant proposal would eliminate the co-channel interference and the short-spacing between the stations. In addition, it will also reduce terrain shielding to Station WKXQ(FM).

3. We believe the public interest would be served by substituting Channel 223A for Channel 244A at Rushville, since it would enable Station WKXQ(FM) to provide improved FM service to the community. An engineering analysis has determined that Channel 223A can be allotted to Rushville in compliance with the Commission's minimum distance separation requirements at petitioner's licensed site with a site restriction of 8.3 kilometers (5.1 miles) northwest of the community.[2]

4. Accordingly, pursuant to the authority contained in Sections (4i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Rushville, Illinois | 223A |

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WKXQ(FM), Rushville, Illinois, IS MODIFIED, to specify operation on Channel 223A in lieu of Channel 244A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WKXQ(FM)'s license, BLH-850528KJ except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the license BLH-850528KJ, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's request although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has complied accordingly.

[2] The coordinates for Channel 223A at Rushville are North Latitude 40-08-20 and West Longitude 90-39-26.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-64**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8618 |
| Table of Allotments, | |
| FM Broadcast Stations | |
| (Talking Rock, Georgia) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 4, 1995; Released: August 14, 1995**

By the Chief, Allocations Branch:

1. Pursuant to the request of Funseeker's Network, Inc. ("FNI"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 5413 (1995), proposing the allotment of Channel 261A to Talking Rock, Georgia, as that community's first local transmission service. FNI filed comments restating its intention to apply for the channel if allotted. Mark Hellinger also filed comments expressing an interest in the allotment and stating his intention to apply for the channel.

2. We believe the public interest would be served by allotting Channel 261A to Talking Rock, since it could provide a first local transmission service to the community. As indicated in the *Notice*, Channel 261A can be allotted to Talking Rock in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.6 kilometers (8.5 miles) north,[1] in order to avoid a short spacing to the licensed sites of Station WNNX(FM), Channel 259C, Atlanta, Georgia, and Station WUSY(FM), Channel 264C, Cleveland, Tennessee.

3. Accordingly, pursuant to the authority contained in Sections (4i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Talking Rock, Georgia | 261A |

4. The window period for filing applications will open on **September 28 , 1995**, and close on **October 30, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 261A at Talking Rock are North Latitude 34-37-54 and West Longitude 84-31-24.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MCI COMMUNICATIONS CORPORATION — File No. ISP-95-008

Petition for Declaratory Ruling
Concerning Section 310(b)(4) and (d)
of the Communications Act of 1934,
as amended

## DECLARATORY RULING

**Adopted: August 4, 1995; Released: August 14, 1995**

By the Chief, International Bureau:

## INTRODUCTION

1. On May 30, 1995, MCI Communications Corporation (MCI) filed a petition for declaratory ruling (petition) seeking approval for an increase in the foreign ownership of MCI's capital stock from 28 to 35 percent. Specifically, MCI seeks a ruling that such increased foreign ownership is consistent with the public interest under Section 310(b)(4) of the Communications Act (the Act) and does not constitute a transfer of control under Section 310(d) of the Act.[1] We grant MCI's petition. As the Commission indicated when it approved 28 percent foreign ownership in MCI in 1994, additional foreign equity contributions will enhance MCI's ability to expand and improve network services and products for American consumers, stimulating U.S. economic growth.[2]

## BACKGROUND

2. MCI is a publicly-traded U.S. corporation that owns or controls subsidiaries that hold domestic common carrier microwave licenses, international facility authorizations, cable landing licenses, and miscellaneous other licenses and authorizations.[3] MCI is the second largest U.S. carrier of long distance telecommunications services. MCI also provides a broad spectrum of domestic and international voice and data communications services.

3. Last year in the MCI/BT Order, the Commission approved the acquisition of 20 percent of MCI by British Telecommunications plc (BT), the largest telecommunications operator in the United Kingdom. This transaction resulted in a total of 28 percent foreign investment in MCI. The Commission specifically concluded that 28 percent foreign ownership of MCI was consistent with Section 310(b)(4) of the Act, which gives the Commission discretion to disallow foreign ownership in excess of 25 percent along a vertical ownership chain if it finds the foreign investment is not in the public interest. First, the Commission found that BT's 20 percent investment, in addition to the existing foreign investment in MCI, involved only a potential three percent fluctuation beyond the 25 percent statutory benchmark. Second, the Commission concluded that there was a dominant U.S. presence among MCI's officers, directors, and shareholders: 80 percent U.S. directors and 100 percent U.S. officers in MCI, and 100 percent U.S. officers and directors in MCI's Title III licensee subsidiaries. Third, the Commission found that, since only common carrier radio licenses were involved, no control over the content of transmissions would occur. Finally, the Commission observed that there was a significant public interest reason to permit increased foreign ownership: BT's investment would enable MCI to expand and improve its services to the American public, stimulating economic growth and creating new job opportunities for U.S. citizens.[4]

4. The Commission also concluded that BT's investment in MCI did not result in a transfer of control of MCI to BT under Section 310(d) of the Act. The Commission found that BT's consent rights regarding matters such as issuance of new equity, the sale of assets, certain business combinations, and entry into telecommunications and non-telecommunications businesses, as well as certain voting rights, did not rise to the level of a transfer of control. The Commission further noted BT's expressed intent not to control MCI and the absence of any evidence to the contrary.[5]

5. In its MCI/BT Order approving BT's acquisition, the Commission nonetheless required MCI to conduct periodic surveys of its public shareholders to ensure continuing compliance with the then-approved 28 percent maximum level of foreign ownership in MCI.[6] MCI filed the instant petition in response to that requirement. MCI's surveys apparently now indicate that its foreign ownership may soon exceed the 28 percent level, although BT's percentage ownership is not expected to change. MCI generally asserts that all of the findings and conclusions reached in the MCI/BT Order are relevant here and are a basis for approval of 35 percent foreign ownership in MCI. MCI also states that no transfer of control would result because the "modest" increase in such foreign ownership would arise from passive investment on a widely dispersed basis and no single foreign investor would own more than one percent of MCI's stock.[7]

6. MCI's petition was placed on public notice on June 22, 1995. American Telephone and Telegraph Corp. (AT&T) and Sprint Communications Co. (Sprint) filed comments in support. MCI and AT&T filed replies. AT&T notes that passive shareholders will not enter into operating agreements with MCI, and do not have the ability to influence or control MCI's operations. Despite its general support of the petition, AT&T urges the Commission to

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[1] 47 U.S.C. §310(b)(4), (d) (1994).
[2] *MCI Communications Corporation and British Telecommunications plc*, 9 FCC Rcd 3960 (1994) 9 FCC Rcd 3960 (1994) (*MCI/BT Order*).
[3] *See id.*
[4] *Id.* at 3964.
[5] *Id.* at 3963.
[6] *Id.* at 3963 n.37.
[7] MCI Petition for Declaratory Ruling at 7 ("MCI Petition").

require MCI to report annually any investment it becomes aware of by a foreign "carrier." According to AT&T, foreign carriers have the potential to discriminate among U.S. carriers if they control access to essential facilities. Thus, AT&T asserts, foreign carrier investment cannot necessarily be deemed to be passive in nature and must be closely monitored.[8]

7. Sprint believes that there will be no change in control in MCI, and that the public interest will not be adversely affected.[9] Sprint also notes that MCI has not disclosed whether the additional investment is held by foreign carriers, but states that even if that were the case, "Sprint does not believe that non-controlling investments of this magnitude could give rise to any serious policy concerns."[10]

## DISCUSSION

8. Foreign ownership greater than 25 percent in MCI, the parent corporation of Title III common carrier radio licensees, triggers the applicability of Section 310(b)(4) of the Act. Under Section 310(b)(4), "[n]o . . . common carrier . . . license shall be . . . held by . . . any corporation directly or indirectly controlled by any corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens . . . if the Commission finds that the public interest will be served by the . . . revocation of such license."[11] As stated above, we have the discretion under Section 310(b)(4) to disallow foreign ownership along a vertical ownership chain that exceeds the 25 percent benchmark.

9. We conclude that permitting MCI to increase its foreign ownership by seven percent from 28 to 35 percent is not inconsistent with the public interest under Section 310(b)(4). The increased foreign ownership will come from passive investors, each of which who will each own less than one percent of MCI stock.[12] The owners are passive and widely dispersed investors and, as such, will have neither the interest nor the ability to control MCI. BT's ownership in MCI is not expected to change as a result of the proposed increase in MCI's foreign ownership and, in any event, MCI continues to be bound by the requirements of the MCI/BT Order.[13] Further, the dominant U.S. presence on MCI's Board of Directors and in its management remains unchanged. The licenses at issue are common carrier, which the Commission has traditionally found raise fewer policy concerns in the context of foreign ownership than do broadcast licenses. Allowing an additional seven percent foreign ownership in MCI under these circumstances is consistent with prior Commission and Bureau actions.[14]

10. We also find persuasive arguments that increased, widely dispersed foreign ownership in MCI will serve the public interest. MCI states that allowing additional foreign investment in MCI will "assist MCI to expand its domestic and international networks and markets for the benefit of U.S. consumers, and stimulate U.S. economic growth...."[15] Sprint observes that such foreign investment provides capital that "can fuel investment in state-of-the-art infrastructure that leads to economic growth and job formation in the U.S. economy . . . [and] facilitates the strengthening of competition by U.S. carriers both at home and abroad."[16] We agree, and thus conclude that allowing these additional foreign equity contributions is not inconsistent with the public interest under Section 310(b)(4).

11. We decline to require MCI to report annually any foreign carrier investment of which it becomes aware, as requested by AT&T. We find that such a requirement is unnecessary. We do require MCI, however, to report if any foreign investor acquires and accumulates more than a one percent interest in MCI.

12. As to the transfer of control issue, we note that the increased foreign ownership will come from passive investors, no single foreign investor will own more than one percent of MCI's stock, and these investors will not acquire a right to determine MCI policy or to dominate MCI management. Further, MCI's Board of Directors and its manner of conducting business will go unchanged. Under these circumstances, the proposed increased foreign ownership will not result in a transfer of control.

## CONCLUSION

13. We conclude that the public interest will be served by the grant of this declaratory ruling. Based on MCI's representations that the increased foreign investment will be passive and no foreign investor (other than BT) will own more than one percent, we find that the proposed increase in foreign ownership of MCI from 28 to 35 percent is not inconsistent with the public interest under Section 310(b)(4) of the Act. We also find that the increased foreign ownership does not constitute a transfer of control under Section 310(d).

## ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the petitioner's request for a declaratory ruling IS GRANTED. The level of 35 percent foreign ownership in MCI, as described in the petition, is not inconsistent with the public interest Section 310(b)(4) of the Act. Prior approval pursuant to Section 310(d) of the Act is not required because the transaction does not involve a transfer of control.

15. IT IS FURTHER ORDERED that MCI shall continue to conduct periodic surveys of its public shareholders to ensure compliance with the 35 percent maximum level of foreign ownership in MCI found to be not inconsistent with the public interest pursuant to Section 310(b)(4) of the Act.

16. IT IS FURTHER ORDERED that MCI shall notify the Bureau if the ownership interest of any foreign investor exceeds one percent.

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[8] AT&T Reply at 2.
[9] Sprint Comments at 2.
[10] *Id.* at 3.
[11] 47 U.S.C. § 310(b)(4).
[12] *See* MCI Petition at 5.
[13] *MCI/BT Order* at 3973.
[14] *See, e.g., GRC Cablevision, Inc.*, 47 F.C.C.2d 467, 30 R.R.2d 827 (1974); *Teleport Transmission Holdings*, 8 FCC Rcd 3063 (Com. Car. Bur. 1993); *IDB Communications Group, Inc.*, 6 FCC Rcd 4652 (Com. Car. Bur. 1991).
[15] MCI Petition at 6.
[16] Sprint Comments at 2.

17. This order is effective upon adoption. Petitions for reconsideration under Section 1.106 may be filed within 30 days of the date of the public notice of this order. (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**WT Docket No. 95-131**

In the Matter of

Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Service (IVDS) Licenses

## NOTICE OF PROPOSED RULE MAKING

**Adopted: July 31, 1995; Released: August 14, 1995**

**Comment Date: September 20, 1995**
**Reply Comment Date: October 5, 1995**

By the Commission:

## I. INTRODUCTION

1. This *Notice of Proposed Rulemaking* (*Notice*) proposes to amend Section 95.833(a) of the Commission's Rules[1] to eliminate the one-year construction "build-out" requirement for Interactive Video and Data Service (IVDS).[2] licensees. No change is proposed concerning the three-year and five-year construction benchmarks. We initiate this proceeding on our own motion in response to requests by several IVDS licensees that were awarded their licenses as a result of the initial IVDS auction held July 28-29, 1994.[3]

## II. DISCUSSION

2. Section 95.833(a) specifies that each IVDS licensee must make service available to at least 10 percent of the population or geographic area within the license service area within one year of the grant of the license, 30 percent within three years, and 50 percent within five years. As noted, certain auction winners[4] request the elimination of the one-year construction benchmark.[5] They argue that the IVDS equipment market is in early development, and does not yet provide sufficient quantities of suitable, competitively priced equipment. They further argue that technological development will be unnecessarily curtailed if the industry is consigned to the limited scope and application ofthe current equipment options.[6]

3. Section 95.833(a) was crafted in 1992 in the context of awarding licenses by lottery, and was intended "to reduce the filing of speculative applications by entities that have no real intention of implementing [IVDS] systems and to avoid the potential for warehousing of IVDS spectrum."[7] The present proposal is premised on the assumption that the basis for the one-year construction benchmark is no longer necessary when licenses are awarded by auction. The use of auctions to award licenses, we believe, reduces the incentives for speculation. Thus, we tentatively conclude that the one-year benchmark is unnecessary. We believe that where licenses are awarded to those who value them most highly, licensees will have sufficient economic incentives to provide service as quickly as possible and to compete effectively against the other licensee in their service area. We believe, in addition, that it is in the public interest to provide licensees with greater flexibility in making decisions concerning financing, equipment selection, and other considerations related to construction.[8] In addition, because our proposed action would not alter the three- and five-year benchmarks, licensees would still be required to act responsibly in delivering service to the public in a timely fashion, as contemplated by the general rule. Finally, section 309(j)(4)(B)[9] requires that we have performance requirements in auctionable services, and our

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[1] 47 C.F.R. § 95.833(a).

[2] IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service in which licensees may provide information, products, or services to individual subscribers at fixed locations within a service area, and subscribers may provide responses.

[3] These licenses were issued on January 18 or February 28, 1995.

[4] The eighteen IVDS licensees that received their licenses as a result of a lottery held September 15, 1993, have already passed their one year build-out deadline. We waived the one year deadline for 17 of the 18 licenses. These 17 licensees were required to meet the three year-30 percent construction deadline in March, 1997.

[5] Intrinzix Technologies, Inc. (Intrinzix), Letter from James E. Meyers, Esq., to Robert H. McNamara, Acting Chief, Private Radio Division, Wireless Telecommunications Bureau (Jan.24, 1995); Knightsbridge Business Network, Letter from Genilde Guerra, President, to Office of Managing Director (Jan.19, 1995); Women's Collateral Access Fund, Inc., Letter from Nina Brown, Vice President, to Donna Kanin, Private Radio Division, Wireless Telecommunications Bureau (May 22, 1995); Loli, Inc., "Request for Waiver or Request for Rulemaking," filed June 22, 1995; MKS Interactive, Inc., "Petition for Special and Extraordinary Relief," filed October 31, 1994, at 11-12; Self Communications, Inc., "Petition for IVDS System Frequency Change and Request to Hold Construction Requirements in Abeyance," filed January 24, 1995, at 3-4; and joint petitioners AG Partners, Friends of IVDS, IVDCO LLC, IVDS/RLV Partnership, Infopower International, Nanowave Technologies, New England Mobile Communication, Tele-Link Communications, WCTV Partners, Washington Communications, Wayne Partners, and Zarg Corporation, "Petition for Extraordinary Relief," filed August 26, 1994, at 5. In addition, certain of these petitioners have requested that the Commission suspend its processing of IVDS licenses and thereby suspend the commencement of the build-out periods. These requests are moot, given that we have completed the process of granting those licenses to be awarded as a result of the initial, July 28-29, 1994, IVDS auction.

[6] *See, e.g.*, Intrinzix filing, *supra*. The IVDS is, by design, a very flexible radio service, with technical service rules that permit licensees considerable flexibility in choosing equipment specifications/capabilities. *See Report and Order* in GEN Docket No. 91-2, 7 FCC Rcd 1630, 1633 ¶ 21-23, 1637 ¶ 54 (1992).

[7] *Report and Order, supra*, at 1640 ¶ 73; *see also Memorandum Opinion and Order* in GEN Docket No. 91-2, 7 FCC Rcd 4923, 4925 ¶ 13 (1992).

[8] *See Notice of Proposed Rule Making* in WT Docket No. 95-47, FCC 95-158.

[9] 47 U.S.C. § 309(j)(4)(B).

proposed three- and five-year benchmarks are consistent with that statutory requirement. We invite comment on the proposed rule change.

## III. PROCEDURAL MATTERS

**Ex Parte Rules - Non-Restricted Proceeding**

4. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

**Regulatory Flexibility Act**

5. An initial Regulatory Flexibility Analysis is contained in Appendix A to this *Notice*.

6. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Analysis in Appendix A, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

**Comment Dates**

7. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **September 20, 1995** and reply comments on or before **October 5, 1995**. To file formally in this proceeding, you must file an original and five copies of all comments and reply comments. To file informally, you must file an original and one copy of your comments, provided only that the Docket Number is specified in the heading. If you want each Commissioner to receive a personal copy of your comments, you should file an original and nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

**Authority**

8. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

**Further Information**

9. For further information, contact Donna L. Kanin, Federal Communications Commission, Wireless Telecommunications Bureau, Private Wireless Division, 2025 M Street, N.W., Room 8010, Mail Stop 2000-F, Washington, D.C. 20554; (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

### Initial Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal contained in this *Notice*. We request written public comment on the IRFA, which follows. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 11, *supra*.

**Reason for Action**

The Commission proposes to amend Part 95 of its rules to eliminate the first-year, 10 percent construction requirement in the Interactive Video and Data Service (IVDS). With competitive bidding, the rationale for the first-year requirement, *i.e.* speculation and spectrum warehousing, no longer exist. This change will provide IVDS licensees more time and greater opportunity for business viability, while the timetable for service to the public remains constant.

**Objectives**

The proposed rule change will provide additional flexibility in satisfying our construction benchmarks, while encouraging greater economic viability of IVDS licensees and timely telecommunications offerings for consumers and producers.

**Legal Basis**

The proposed action is authorized under Sections 4(i), 303(r) and 309(j) of the Communications Act, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

**Report, Recordkeeping and Other Compliance Requirements**

None.

**Federal Rules Which Overlap, Duplicate or Conflict with These Rules:**

None.

**Description, Potential Impact, and Small Entities Involved**

The proposed rule change would benefit IVDS licensees by allowing them greater flexibility in satisfying the construction benchmarks, and thus, greater opportunity for economic viability, without sacrificing service to the public. Most IVDS licensees are expected to be small entities.

**Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives**

None.

## APPENDIX B

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 95-Personal Radio Services

1. The authority citation for Part 95 continues to read as follows:

**Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.**

2. Section 95.831 is revised to read as follows:

**§ 95.831 Service requirements.**

Subject to the initial construction requirements of Section 95.833, each IVDS system licensee must make the service available to at least 50 percent of the population or land area located within the service area.

2. Section 95.833 is revised to read as follows:

**§ 95.833 Construction requirements.**

(a) Each IVDS system licensee must make the service available to at least 30 percent of the population or land area within the service area within three years of grant of the IVDS system, and 50 percent of the population or land area within five years of grant of the IVDS system license. Failure to do so will cancel the IVDS system license automatically. For the purposes of this section, a CTS is not considered as providing service unless that CTS and two associated RTUs are placed in operation.

(b) Each IVDS system licensee must file a progress report at the conclusion of each of the two benchmark periods to inform the Commission of the construction status of the system. The report must be addressed to: Federal Communications Commission, Wireless Telecommunications Bureau, Special Services Branch, 1270 Fairfield Road, Gettysburg, PA 17325-7245. The report must include:

(1) A showing of how the system meets the benchmark; and

(2) A list, including addresses, of all component CTSs constructed.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

PageAmerica Of New York, Inc., and PageAmerica Of California, Inc., Stations in the Public Mobile Service — Filed No. CWD-95-6

**ORDER**

**Adopted: July 28, 1995; Released: August 15, 1995**

By the Deputy Chief, Wireless Telecommunications Bureau:

## I. INTRODUCTION

1. By this Order, we adopt a Consent Decree between the Wireless Telecommunications Bureau (the "Bureau") and PageAmerica of New York, Inc. and PageAmerica of California, Inc. (collectively "PageAmerica") regarding certain Public Mobile Service ("PMS") facilities that PageAmerica has voluntarily disclosed to be in violation of the Commission's rules. We also address PageAmerica's request for waiver of Section 22.317 (formerly Section 22.303) of the Commission's rules with respect to these facilities.[1] As discussed more fully below, we conclude that adoption of the Consent Decree is in the public interest and that PageAmerica has shown good cause for grant of a waiver.

## II. BACKGROUND

2. PageAmerica has been a licensee of PMS paging facilities throughout the country since 1983. On December 31, 1993, PageAmerica acquired approximately 217 licensed paging and link transmitters in California, Nevada, and Florida by assignment from Crico Communications.[2] On July 22, 1994, PageAmerica acquired an additional 12 licensed facilities in California from the Forsyth Company.[3] Prior to the completion of these acquisitions, PageAmerica was assured that the acquired facilities were fully operational. PageAmerica also conducted several random inspections that revealed no apparent problems with respect to the operation of the facilities or their conformance with the Commission's rules.[4]

3. After completion of the acquisitions, PageAmerica began a more comprehensive facilities audit to integrate the acquired facilities with its pre-existing systems.[5] As a result of this audit, PageAmerica discovered a substantial number of acquired facilities that were not constructed or operational due to lack of the requisite number of transmitters or lack of power. PageAmerica also discovered a smaller number of instances where transmitters had been constructed and power was available, but the facilities were non-operating due to equipment damage or disconnected remote control links. Specifically, PageAmerica discovered 12 transmitters that required repairs due to storm damage or equipment failure, 13 transmitters with remote control disconnected or in need of repair, and one transmitter that was constructed and operational but for which no remote control had been provided.[6] All of these problems apparently predated PageAmerica's acquisition of the facilities

4. As a result of the audit, PageAmerica voluntarily returned the licenses for 89 paging, link, and microwave facilities to the Commission for cancellation, representing approximately 40 percent of the acquired facilities and 22 percent of the acquired channels.[7] Most of these cancelled authorizations were for unconstructed facilities, although a few were constructed but not operating. PageAmerica also took steps to repair the substantially constructed facilities that were damaged or lacked remote control capability. These facilities are now capable of operation.[8]

5. On May 16, 1995, PageAmerica notified the Commission by letter of the results of its audit and the steps that it had taken to come into compliance with the Commission's rules.[9] PageAmerica also requested that the Commission waive the automatic cancellation provisions of Section 22.317 with respect to the 26 constructed but non-operating sites.[10] PageAmerica acknowledges that these facilities had been non-operating for more than the 90-day limit set forth in the rule, but argues that automatic cancellation of the licenses would not serve the public interest. First, PageAmerica notes that the violations were caused by its predecessors, and that it was unaware of the violations until it conducted a system audit. PageAmerica also argues that cancelling the licenses and relicensing the channels would cause a considerable delay in these frequencies being available to provide service, and that it would prevent the development of PageAmerica's operational facilities into a wide-area system. Finally, PageAmerica argues that its voluntary disclosure of the violations and relinquishment of authorizations shows that it has made good faith efforts to comply with the Commission's rules.[11]

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[1] *See* Letter to William F. Caton from Richard Contrera, Vice President of Engineering for PageAmerica, dated May 16, 1995. (PageAmerica Waiver Request).
[2] *See* Public Notice, CCB Rpt. No. PMS-93-27, April 7, 1993.
[3] *See, e.g.*, Public Notice, CCB Rpt. No. PMS 94-12, Dec. 22, 1993.
[4] Page America Waiver Request at 2.
[5] *Id.* at 2-3.
[6] *Id.* at 3-4.
[7] *Id.* at 3.
[8] *Id.* at 4-5.
[9] PageAmerica had previously informed the Bureau staff of these issues orally.
[10] Page America Letter at 5-7. Section 22.317 (formerly Section 22.303) states in part:

> If a station licensed under this part discontinues operation on a permanent basis, the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section,any station which has not operated for 90 continuous days is considered to have permanently discontinued.

47 C.F.R § 22.317.
[11] PageAmerica Waiver Request at 5-7.

6. In light of these circumstances, PageAmerica contends that it should be subject to monetary forfeiture rather than cancellation of these authorizations, and has stated its willingness to make voluntary payment pursuant to a consent decree. PageAmerica also notes that as a result of the cost of repairs and other upgrades, as well as other capital constraints, it lacks the financial resources to continue operations, and is therefore in negotiations with Paging Network, Inc. to acquire the systems.[12] PageAmerica states that the proceeds from this proposed sale will go entirely to its creditors.[13]

## III. DISCUSSION

7. In response to PageAmerica's disclosures and waiver request, the Bureau initiated an investigation into this matter. The Bureau has received full cooperation from PageAmerica in this regard. After analysis of the relevant facts, we reach the following conclusions. First, we note that the violations disclosed by PageAmerica appear to have been discovered by PageAmerica after its acquisition of the subject facilities. Second, within a reasonable time of its discovery of the violations, PageAmerica voluntarily returned all unconstructed authorizations for cancellation. Third, the authorizations that PageAmerica has requested not to be cancelled are for facilities that are substantially constructed but were non-operating due to damage or lack of remote control facilities, and PageAmerica has voluntarily disclosed the non-operational status of these facilities. Fourth, we find no indication that PageAmerica has willfully violated the Commission's rules or failed to disclose material information to the Commission. Finally, as discussed more fully below, PageAmerica has agreed to enter into the Consent Decree set forth in this Order, whereby it will make a substantial voluntary payment in lieu of forfeiture proceedings.

8. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree set forth below. Under the terms of the Consent Decree, PageAmerica agrees to make a voluntary payment totalling $125,000 for deposit into the United States Treasury, and the Bureau agrees to terminate its investigation into the matters alleged in this proceeding. We consider this amount to be appropriate to the facts disclosed by PageAmerica, in light of its history of overall compliance with the rules, its voluntary cancellation of a substantial number of unconstructed licenses, and its voluntary disclosure of the violations.

9. We also conclude that the underlying purpose of the Commission's automatic cancellation rule would not be served by cancellation of the 26 licenses at issue. The purpose of Section 22.317 is to prevent spectrum hoarding and to make unused spectrum promptly available for future use. There is no evidence that PageAmerica is seeking to hoard spectrum in this instance, however. To the contrary, PageAmerica has voluntarily returned numerous unconstructed licenses so that the spectrum can be licensed to others. In addition, we do not believe the goal of promoting future spectrum use would be furthered by cancellation or undermined by a waiver. The licenses at issue are for substantially constructed facilities that have been repaired, can readily be placed in operation, and will augment service provided by existing paging systems. As a practical matter, cancelling the licenses and relicensing the channels would cause a greater delay in service being made available to the public.

10. In granting PageAmerica's waiver request, we emphasize that it remains our intent to strictly enforce the provisions of Section 22.317 as a general rule. Our decision in this case is expressly based on the distinctive circumstances presented by PageAmerica: the fact that the facilities at issue were substantially constructed, that PageAmerica did not cause the initial violations, and that PageAmerica voluntarily cancelled numerous unconstructed authorizations and disclosed the additional rule violations. In light of these circumstances, we agree that a monetary forfeiture in lieu of cancellation would be an appropriate remedy, and note that PageAmerica has agreed to make a voluntary payment pursuant to the Consent Decree. We therefore believe it is in the public interest to grant the requested waiver and will reinstate the PageAmerica authorizations identified in Appendix A to this Order. The grant of these waivers is conditional on PageAmerica's entry into the Consent Decree, the terms and conditions of which are attached.

## IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Consent Decree attached to this Order IS ADOPTED.

12. IT IS FURTHER ORDERED that the investigation of PageAmerica initiated by the Wireless Telecommunications Bureau IS TERMINATED.

13. IT IS FURTHER ORDERED that PageAmerica's request for waiver is GRANTED and the authorizations identified in Appendix A ARE REINSTATED, conditioned on the execution of the Consent Decree by PageAmerica and its full performance of the provisions of the Decree.

14. IT IS FURTHER ORDERED that the facilities for which authorizations were reinstated here must be operational within sixty (60) days of the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Wireless Telecommunications Bureau

[12] *Id.* at 5n.3. PageAmerica has not yet sought Commission approval of the transfer, and this Order does not address the issue of whether the transfer would be in the public interest.
[13] *Id.*

## APPENDIX A

| ST | CITY | LOCATION | CALL SIGN | FREQUENCY |
|---|---|---|---|---|
| CA | Los Gatos | At Loma Prieta Peak, Approx. 10 miles SE of Los Gatos | KMA741 | 454.25000 |
| FL | Boca Raton | 351 SW First Avenue | KFQ941 | 454.20000 |
| FL | Boca Raton | 351 SW First Avenue | KFQ941 | 454.35000 |
| FL | Daytona Beach | 1.5 M. South of State Hwy 40 and State Hwy 5A Intersection | KNKK678 | 454.17500 |
| FL | Ft. Lauderdale | 1400 N.W. 23rd Avenue | KIR204 | 454.10000 |
| FL | Ft. Pierce | 607 E. Atlantic Avenue | KIG838 | 152.21000 |
| FL | Jupiter | 200 Ocean Trailway | WRV271 | 454.25000 |
| FL | Jupiter | 200 Ocean Trailway | WRV271 | 454.10000 |
| FL | Jupiter | 200 Ocean Trailway | WRV271 | 454.27500 |
| FL | Stuart | Ranchwood St, 7.3 miles SW of Stuart | WRW257 | 454.20000 |
| FL | Stuart | Ranchwood St, 7.3 miles SW of Stuart | WRW257 | 454.35000 |
| FL | Stuart | Ranchwood St, 7.3 miles SW of Stuart | WRW257 | 454.17500 |
| CA | Freemont | Mission Ridge | KNKL528 | 931.51250 |
| CA | Fresno | 2220 Tulare Street | KQZ715 | 931.46250 |
| CA | Milipitas | Allison Peak Approx. 4.5 miles NE of Milipitas | KMA741 | 454.30000 |
| CA | Milipitas | Allison Peak Approx. 4.5 miles NE of Milipitas | KMA741 | 454.25000 |
| CA | Sacramento | 926 "J" Street | KQZ715 | 454.46250 |
| CA | Vacaville | Mount Vaca, 6 miles NW of Vacaville | KNKL528 | 931.51250 |

## APPENDIX A
(continued)

| ST | CITY | LOCATION | CALL SIGN | FREQUENCY |
|---|---|---|---|---|
| FL | Ft. Lauderdale | 100 SE Third Avenue | KPA332 | 931.76250 |
| FL | Ft. Pierce | 607 E. Atlantic Avenue | KIG838 | 454.10000 |
| FL | Ft. Pierce | 607 E. Atlantic Avenue | KIG838 | 454.17500 |
| FL | Ft. Pierce | 607 E. Atlantic Avenue | KIG838 | 454.25000 |
| FL | Melbourne | 3109 S. Main Street | KNKK678 | 454.17500 |
| Fl | Miami | Ferre Building, 100 Biscayne Blvd. | KRM963 | 931.73750 |
| FL | Titusville | 3430 Kilmarnoch Lane | KNKK678 | 454.17500 |
| FL | Jacksonville | 1301 Gulf Life Drive | KPA332 | 931.76250 |

## CONSENT DECREE

### I. INTRODUCTION

14. This is a Consent Decree between the Wireless Telecommunications Bureau of the Federal Communications Commission ("Bureau") and PageAmerica of New York, Inc. and PageAmerica of California, Inc. (collectively "PageAmerica").

15. Under the terms of this Consent Decree, PageAmerica agrees to make a voluntary payment of $125,000 for deposit to the United States Treasury, and the Bureau agrees to terminate its investigation into the matters alleged in this proceeding.

### II. BACKGROUND

16. At the relevant times referenced herein, PageAmerica was the licensee of certain Public Mobile Service facilities in California and Florida. These facilities were acquired in December 1993 and July 1994. Prior to the completion of these acquisitions, PageAmerica was assured that the acquired facilities were fully operational. PageAmerica also conducted several random inspections that revealed no apparent problems with respect to the operation of the facilities or their conformance with the Commission's rules.

17. After completion of the acquisitions, PageAmerica began a more comprehensive facilities audit to integrate the acquired facilities with its pre-existing systems. As a result of this audit, PageAmerica discovered a substantial number of acquired facilities that were neither constructed nor operational due to lack of the requisite number of transmitters or lack of power. PageAmerica voluntarily returned a total of 89 authorizations for these facilities to the Commission for cancellation. PageAmerica also discovered 26 instances in which transmitters had been constructed and power was available, but the facilities were non-operational due to equipment damage or disconnection of remote control links. A list of these non-complying licenses is set forth in Attachment A. All of these facilities were non-operational for more than 90 days, in violation of 47 C.F.R § 22.317.

18. On May 17, 1995, PageAmerica notified the Commission by letter of the above-referenced violations and requested waiver of the automatic cancellation of the 26 non-complying licenses. Since that time, the Bureau has reviewed PageAmerica's submissions regarding the circumstances under which the violations occurred and has met with PageAmerica's representatives.

### III. DEFINITIONS

19. For the purposes of this Decree, the following definitions apply:

(a) "Page America" means PageAmerica of New York, Inc. and PageAmerica of California, Inc., separately and collectively, or any of their successors-in-interest.

(b) "Order" means an order of the Bureau adopting the terms and conditions of this Decree.

(d) "Final Order" means an Order of the Bureau that is no longer appealable or subject to administrative or judicial reconsideration, review, appeal, or stay.

### III. AGREEMENT

20. PageAmerica admits the jurisdiction of the Commission over it and the subject matter of this action for purposes of this Decree and the Order adopting this Decree.

21. PageAmerica waives any rights it may have to judicial review, appeal, or rights otherwise to challenge or contest the validity of any Order adopting this Decree. PageAmerica agrees that upon signing of the Decree by the Bureau and PageAmerica, the provisions of this Decree shall be incorporated by reference in the Order formally adopting this Decree.

22. In consideration for the Bureau's entering into this Decree and in order to avoid any disruption of service to the public, to conserve Commission resources, and to avoid litigation costs, PageAmerica agrees to the following terms:

(a) PageAmerica will make a voluntary payment to the United States Treasury of $125,000 within thirty (30) days after the Order becomes a Final Order. Payment may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, to Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

(b) PageAmerica agrees that the payment of $125,000 may not be claimed as a tax deduction.

(c) Failure by PageAmerica to comply with these terms shall be considered a failure of compliance with this Decree.

23. In light of the covenants and representations contained in this Decree and in express reliance thereon, the Bureau will terminate its investigation of PageAmerica. Further, in the absence of additional facts not made available in this proceeding, the Bureau will not institute any proceedings against PageAmerica based upon the information obtained during the investigation or otherwise referenced in the Order.

24. PageAmerica agrees that any violation of the Order or this Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights or remedies available for enforcement of a Commission order.

25. If this Decree is not signed by PageAmerica and the Bureau, or it is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

26. If the Commission or the United States on behalf of the Commission brings a judicial action to enforce the terms of the Order incorporating the terms of the Decree, PageAmerica agrees that it will not contest the validity of the Order, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of the Decree.

PAGEAMERICA OF NEW YORK, INC.

By: /RICHARD CONTRERA/
Richard Contrera

Date: July 28, 1995

FEDERAL COMMUNICATIONS COMMISSION, WIRELESS TELECOMMUNICATIONS BUREAU

By: /GERALD P. VAUGHAN/
Gerald P. Vaughan
Deputy Chief

Date: July 28, 1995

PAGEAMERICA OF CALIFORNIA, INC.

By: /RICHARD CONTRERA/
Richard Contrera

Date: July 28, 1995

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. — File No. I-T-C-95-365

Application for authority to acquire and operate facilities for service between the United States and Palau.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: August 8, 1995; Released: August 15, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and Palau by Sprint Communications Company L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-365 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate one 512 Kbps satellite circuit between Sprint's San Ramon, California earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with a similar circuit between the satellite and an earth station in Palau, furnished by Sprint's correspondent;

b. own and operate facilities in the San Ramon earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate connecting facilities between the San Ramon earth station and Sprint's Stockton, California operating center;

d. use said facilities to provide Sprint's regularly authorized services between the United States and Palau.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Palau -- that is, private lines which originate in the United States and terminate in Palau or which originate in Palau and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Palau end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Palau affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ATI TELECOM, INC. File No. I-T-C-95-390

Application for authority to acquire and operate facilities for service to various overseas points.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: August 8, 1995; Released: August 15, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a partial grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-390 IS GRANTED IN PART, and ATI Telecom, Inc. (ATI) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix C, furnished by its correspondents;

e. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix D, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix D, furnished by its correspondents;

f. establish channels of communication between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix E;

g. lease and operate any necessary domestic connecting facilities;

h. lease a one-half interest in and operate any necessary overseas connecting facilities; and

i. use the facilities in b, c, d and e, above, to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendices.

3. IT IS FURTHER ORDERED that neither ATI nor any persons or companies directly or indirectly controlling or controlled by ATI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ATI or any persons or companies controlling or controlled by ATI are parties.

4. IT IS FURTHER ORDERED that our authorization of ATI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, ATI may not -- and ATI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, PAS-4, TDRS-41, TDRS-174, or Orion F1 satellites.

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

12. IT IS FURTHER ORDERED that action on the applicant's request to acquire Morelos and Solidaridad circuits to countries in addition to Mexico is hereby DEFERRED pending the outcome of the Notice of Proposed Rulemaking in *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems,* IB Docket No. 95-41, FCC 95-146, released April 25, 1995.

13. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

## APPENDIX A

### COUNTRIES TO BE SERVED VIA INTELSAT

| Country | Circuits | Country | Circuits | Country | Circuits |
|---|---|---|---|---|---|
| Argentina | 80 | Haiti | 80 | Poland | 80 |
| Australia | 80 | Honduras | 80 | Portugal | 80 |
| Austria | 80 | India | 80 | Romania | 80 |
| Bahamas | 80 | Indonesia | 80 | Saudi Arabia | 80 |
| Barbados | 80 | Iran | 80 | Senegal | 80 |
| Belgium | 80 | Ireland | 80 | Singapore | 80 |
| Bolivia | 80 | Israel | 80 | Somalia | 80 |
| Brazil | 80 | Italy | 80 | South Africa | 80 |
| Canada | 80 | Jamaica | 80 | Spain | 80 |
| Czech Republic | 80 | Japan | 80 | Sweden | 80 |
| Chile | 80 | Jordan | 80 | Switzerland | 80 |
| China, People's Republic | 80 | Kenya | 80 | Syria | 80 |
| Croatia | 80 | Korea, Republic of | 80 | Taiwan | 80 |
| Denmark | 80 | Kuwait | 80 | Thailand | 80 |
| Dominican Republic | 80 | Lebanon | 80 | Trinidad & Tobago | 80 |
| Ecuador | 80 | Liechtenstein | 80 | Uganda | 80 |
| Egypt | 80 | Luxembourg | 80 | United Arab Emirates | 80 |
| El Salvador | 80 | Malaysia | 80 | United Kingdom | 80 |
| Ethiopia | 80 | Mexico | 80 | Uruguay | 80 |
| Finland | 80 | Morocco | 80 | Vietnam | 80 |
| France | 80 | Netherlands | 80 | Venezuela | 80 |
| Guantanamo Bay | 80 | Netherlands Antilles | 80 | Macedonia, FYRO | 80 |
| Germany, Federal Republic of | 80 | New Zealand | 80 | Zaire | 80 |
| Ghana | 80 | Nicaragua | 80 | Slovenia | 80 |
| Greece | 80 | Norway | 80 | | |
| Guatemala | 80 | Panama | 80 | | |
| Guinea | 80 | Peru | 80 | | |
| Serbia & Montenegro | 80 | Philippines | 80 | | |
| Bosnia-Herzegovenia | 80 | | | | |

## APPENDIX B

### COUNTRIES TO BE SERVED VIA PAS-1 (NON-INTERCONNECTED)

Up to 24 64-Kbps voice-grade circuits between the United States and the Dominican Republic and up to ten 64 -Kbps voice-grade circuits between the United States and the countries listed below:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzegovina
British Virgin Is.
Cayman Islands
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Serbia and Montenegro
Spain
Sweden
Switzerland
Turks & Caicos Is.
United Kingdom
Macedonia, FYRO
Croatia
Slovenia

C-band Countries:

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

## COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Up to 24 64-Kbps voice-grade circuits between the United States and the Dominican Republic and up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzegovina
Czech Republic
Portugal
Romania
Russian Fed.
Serbia and Montenegro
United Kingdom
Macedonia, FYRO

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

## COUNTRIES TO BE SERVED VIA PAS-2 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the following country:

United Kingdom

## COUNTRIES TO BE SERVED VIA PAS-2 (INTERCONNECTED)

Up to six 64 -bps voice-grade circuits between the United States and the following country:

United Kingdom

## COUNTRIES TO BE SERVED VIA PAS-4 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the following countries:

Australia
Hong Kong
New Zealand

## COUNTRIES TO BE SERVED VIA PAS-4 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the following countries:

Australia
Hong Kong
New Zealand

## APPENDIX C

### COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRSS (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

| TDRSS-41 | TDRSS-174 |
|---|---|
| Austria | Hong Kong |
| Bahamas | Japan |
| Belgium | Mexico |
| Bosnia-Herzegovina | Philippines |
| Canada | Republic of Korea |
| Denmark | |
| Finland | |
| France | |
| Germany | |
| Ireland | |
| Israel | |
| Jamaica | |
| Liechtenstein | |
| Luxembourg | |
| Mexico | |
| Netherlands | |
| Portugal | |
| Serbia and Montenegro | |
| Sweden | |
| Switzerland | |
| Turkey | |
| United Kingdom | |
| Macedonia, FYRO | |

### COUNTRIES TO BE SERVED VIA TDRSS (INTERCONNECTED)

Up to six 64 Kbps voice grade circuits between the U.S. and the non-INTELSAT and INTELSAT member countries listed below:

| TDRS-41 | TDRS-174 |
|---|---|
| Germany | Hong Kong |
| Bosnia-Herzegovina | |
| Serbia and Montenegro | |
| United Kingdom | |
| Macedonia, FYRO | |

## APPENDIX D

### COUNTRIES TO BE SERVED VIA ORION SATELLITE CORPORATION'S F-1 SATELLITE (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and the countries listed below:

Germany
Ireland
The Netherlands
Poland
Sweden

### COUNTRIES TO BE SERVED VIA ORION SATELLITE CORPORATION'S F-1 SATELLITE (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and the countries listed below:

Austria
Belgium
Denmark
France
Germany
Ireland
Italy
Luxembourg
Norway
Poland
Serbia and Montenegro
Sweden
The Netherlands
United Kingdom
Macedonia, FYRO

## APPENDIX E

### COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES, AND ANIK SATELLITES

| | |
|---|---|
| Anguilla | Domestic Satellites |
| Antigua and Barbuda | Domestic Satellites |
| Argentina | Domestic Satellites |
| Bahamas | Domestic Satellites |
| Barbados | Domestic Satellites |
| Belize | Domestic Satellites |
| Bermuda | Domestic Satellites |
| Bolivia | Domestic Satellites, |
| Brazil | Domestic Satellites |
| British Virgin Islands | Domestic Satellites |
| Canada | Domestic Satellites, ANIK |
| Cayman Island | Domestic Satellites |
| Chile | Domestic Satellites |
| Columbia | Domestic Satellites |
| Dominica | Domestic Satellites |
| Ecuador | Domestic Satellites |
| El Salvador | Domestic Satellites |
| French Guiana | Domestic Satellites |
| Grenada | Domestic Satellites |
| Grenadines | Domestic Satellites |
| Guyana | Domestic Satellites |
| Guatemala | Domestic Satellites |
| Honduras | Domestic Satellites |
| Mexico | Domestic Satellites, Morelos and Solidaridad |
| Montserrat | Domestic Satellites |
| Netherlands Antilles | Domestic Satellites |
| Nicaragua | Domestic Satellites |
| Panama | Domestic Satellite |
| Paraguay | Domestic Satellites |
| Peru | Domestic Satellites |
| St. Kitts & Nevis | Domestic Satellites |
| St. Lucia | Domestic Satellites |
| St. Vincent | Domestic Satellites |
| Suriname | Domestic Satellites |
| Turks & Caicos | Domestic Satellites |
| Uruguay | Domestic Satellites |
| Venezuela | Domestic Satellites |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Liability of Black & Gold Radio Company, Inc.
Licensee of Station WLCS(FM)
North Muskegon, Michigan

File No. BRH-890530WJ

For a Forfeiture

**FORFEITURE ORDER**

**Adopted: July 31, 1995;** **Released: August 15, 1995**

By the Commission:

1. The Commission has under consideration: (1) a $2,000 Notice of Apparent Liability, *Goodrich Broadcasting, Inc.*, 7 FCC Rcd 6655 (1992) ("NAL") issued to Black & Gold Radio Company, Inc. ("Black and Gold"), licensee of Station WLCS(FM), North Muskegon, Michigan; and (2) Black and Gold's request, filed October 30, 1992, for rescission or mitigation of the forfeiture. For the reasons that follow, we deny the request.

2. The NAL was issued for an apparent violation of 47 C.F.R. § 73.2080, which requires, *inter alia,* that licensees establish and maintain a program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice. We found station WLCS(FM)'s EEO efforts to be inadequate and in violation of the EEO Rule. Accordingly, we issued an NAL for $2,000. *Goodrich Broadcasting, Inc.*, 7 FCC Rcd at 6657.

3. The licensee seeks rescission or mitigation of the forfeiture based on the current financial condition of its business. A claim of financial hardship can be a mitigating factor to be weighed against the imposition of a forfeiture. 47 U.S.C. Section 504 (b)(2)(D). However, the information submitted by the licensee in response to the Notice of Apparent Liability does not provide a basis for rescission or mitigation. The financial records submitted by the licensee are not sufficient to prove inability to pay. Even the accountant who prepared the documentation commented on its incompleteness in an attachment to the licensee's petition, stating:

> Management has elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position, results of operations and cash flows.

4. We observe that the information reviewed by Black and Gold's accountant did not include critical material required by generally accepted accounting principles (e.g., necessary disclosures and statements of cash flows). Thus, a fair reading of the accountant's statement is that significant information concerning Black and Gold's financial situation was omitted. Given that there is no basis by which to determine what impact the inclusion of this information would have had on the question of Black and Gold's ability to pay, we are unable to accurately assess the licensee's current financial condition. We, therefore, deny its request that the forfeiture amount be reduced or the NAL be rescinded based on its financial condition.

5. Accordingly, Black & Gold Radio Company, Inc., licensee of Radio Station WLCS(FM), North Muskegon, Michigan, is HEREBY ORDERED TO FORFEIT to the United States the sum of two thousand dollars ($2,000) for violation of Section 73.2080 of the Commission's Rules. Full payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission within 30 days of the release date of this Order. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Forfeiture Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

DIAL SERVICES, INC. File No. I-T-C-95-368

Application for authority to acquire and operate facilities for service to Denmark.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: August 8, 1995; Released: August 15, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-368 IS GRANTED, and DIAL Services, Inc. (DIAL) is authorized to:

a. acquire on an Indefeasible Right of User (IRU) basis a one-half interest in and operate 32 64-kbps voice-grade circuits in the CANTAT-3 Cable System;

b. acquire on an IRU basis a one-half interest in and operate 32 64-kbps voice-grade circuits in the CANUS-1 Cable System;

c. lease and operate any necessary domestic connecting facilities;

d. lease a one-half interest in and operate any necessary overseas connecting facilities; and

e. use said facilities to provide regularly authorized services, including switched voice and data and private line services, between the United States and Denmark.

3. IT IS FURTHER ORDERED that neither DIAL nor any persons or companies directly or indirectly controlling or controlled by DIAL, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which DIAL or any persons or companies controlling or controlled by DIAL are parties.

4. IT IS FURTHER ORDERED that our authorization of DIAL to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Denmark-- that is, private lines which originate in the United States and terminate in Denmark or which originate in Denmark and terminate in the United States. In addition, DIAL may not -- and DIAL's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Denmark end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Denmark affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license for the CANUS-1 cable system issued herein under the Act entitled "An Act relating to the landing and operation of submarine cables in the United States," 47 U.S.C. §§ 34-39.

9. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act of 1934, as amended, before adding any circuits or channels of communication for the provision of service via the CANUS-1 Cable System.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Corneli
Chief, Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Falcon Holding Group, Inc. CUID No. MI0699
(Whitney Township)

Order Denying Jurisdiction

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 8, 1995; Released: August 15, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

InterMedia Partners, on behalf of
Kauai Cablevision, L.P.,
Petitioner,

v.

State of Hawaii Department of Commerce
and Consumer Affairs, Cable Television
Division,
Respondent

Appeal of Rate Orders
of the State of Hawaii Department of
Commerce and Consumer Affairs

Emergency Consolidated Petition for Stay
of Rate Orders of the State of Hawaii
Department of Commerce and Consumer
Affairs

**CONSOLIDATED MEMORANDUM OPINION AND ORDER**

**Adopted: August 8, 1995; Released: August 15, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On March 16, 1995, InterMedia Partners, on behalf of Kauai Cablevision, L.P. ("InterMedia"), the franchisee in the above matters, filed an appeal of two rate orders adopted by the State of Hawaii Department of Commerce and Consumer Affairs, Cable Television Division (the "State") on February 14, 1995.[1] On March 31, 1995, the State filed an opposition to InterMedia's appeal urging the Commission to deny InterMedia's appeal and to direct InterMedia to comply with all of the provisions of the State's rate orders.[2] InterMedia filed a reply to the State's opposition on April 10, 1995.

2. In its rate orders, the State established rates for InterMedia's basic tier service and associated equipment and installations and required InterMedia to refund overcharges to subscribers for the period of time between January 10, 1994 and July 14, 1994.[3] InterMedia raises three issues in its appeal. First, InterMedia contends that the State improperly adjusted Line 104 on each of its two FCC Form 393s in order to make that line equal to Line 301. This adjustment by the State reduced InterMedia's basic tier rate from $8.08 to $7.12 for its Kalaheo system and from $7.12 to $7.02 for its Princeville system,resulting in a combined refund liability in excess of $36,000.00. Second, InterMedia claims that the State acted unreasonably when it afforded InterMedia only 15 days within which to issue refunds pursuant to the rate orders. Third, InterMedia contends that the State unreasonably seeks to extend InterMedia's refund liability period beyond the one-year maximum set forth in the Commission's rules.[4] InterMedia asks the Commission to remand the State's rate orders to the State with appropriate instructions.

3. In response, the State asserts that it acted in accordance with the Commission's rules and precedent when it adjusted InterMedia's entry on Line 104 on each of its FCC Form 393s to make that line equal to its entry on Line 301. Second, the State claims that InterMedia actually had 78 days within which to implement refunds to its subscribers, not 15 days as it asserts in its appeal. Finally, the State contends that its rate orders require InterMedia to issue refunds back to September 1, 1993 only in the event that the Commission grants the State's request for a waiver of §76.942 of the Commission's rules, as described in footnote 3, *supra*. As the Commission has not yet acted on this request, the State contends that InterMedia's appeal is not ripe with regard to this particular issue.

## II. STANDARD OF REVIEW

4. Under the Commission's rules, appeals of franchising authorities' rate orders are reviewed by the Commission.[5] In ruling on appeals of franchising authorities' rate orders, the Commission will not conduct a *de novo* review, but

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[1] On March 13, 1995, InterMedia also filed an Emergency Consolidated Petition for Stay of the State's rate orders. In light of our ruling on InterMedia's appeal herein, InterMedia's Emergency Petition for Stay is rendered moot and is dismissed. *See* paragraph 19, *infra*.

[2] InterMedia is appealing, on a consolidated basis, two rate orders (Decision and Order Nos. 162 and 163) adopted by the State on February 14, 1995 and February 24, 1995. These orders govern the rates charged by InterMedia in its Kalaheo and Princeville systems. According to InterMedia, these two rate orders are substantially identical and pose the same issues for review. The State does not oppose InterMedia's consolidation of its appeals of these two rate orders. Therefore, in the interest of administrative efficiency, we will issue a consolidated order in the instant proceeding which will apply to both of the rate orders in question.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b). The State's rate orders provide that InterMedia's refund liability period may be adjusted to require InterMedia to make additional refunds for the period of time between September 1, 1993 and January 9, 1994 in the event that the Commission grants the State's petition for a waiver of §76.942 of the Commission's rules, which the State filed on December 27, 1994. Simultaneously herewith, we are releasing an order denying the State's petition for a waiver of our rules. *See* In the Matter of State of Hawaii Department of Commerce and Consumer Affairs, Cable Television Division, DA 95-1746 (Cab. Serv. Bur., released August 15, 1995) (*"State of Hawaii"*).

[4] See 47 C.F.R. §76.942(b).

[5] 47 C.F.R. § 76.944.

instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

## III. DISCUSSION

### A. Substitution of Line 301 For Line 104

5. InterMedia contends that the State acted improperly when it adjusted InterMedia's entry on Line 104 of its FCC Form 393s, which reflects its average monthly equipment and installation revenue earned over the last fiscal year, to make it equal to its entry on Line 301 of its FCC Form 393s, which reflects the costs it incurs in an average month for customer equipment and installations. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[9] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[10] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

7. InterMedia contends that the State's adjustment of InterMedia's Line 104 entry resulted in an inappropriate reduction of its maximum permitted rate for the basic service tier. InterMedia states that because its entry on Line 104 was based upon 1992 data, it included revenues which it derived from monthly additional outlet charges. Citing instructions in FCC Form 393 relative to Line 104, as well as paragraphs 93 and 94 of the Commission's *Third Recon. Order,* InterMedia asserts that it was entitled to use pre-regulatory data from 1992 in Line 104. InterMedia claims that the Commission permits operators to use then-current data to justify their rates as long as that data was accurate at the time. InterMedia contends that its data was accurate at the time, and, therefore, it should be allowed to use that data.[11] Thus, it is InterMedia's position that because it received revenues from additional outlet fees prior to rate regulation, and such revenue was included in its entry on Line 104, its entries on Lines 104 and 301 should differ by approximately the amount of the revenues received from additional outlets. Furthermore, InterMedia alleges that, simultaneous with Commission pronouncements that Lines 104 and 301 should be the same, or nearly the same for operators who restructured their rates as of September 1, 1993, the Commission has acknowledged that special circumstances may exist which produce discrepancies between lines 104 and 301.[12] Intermedia contends that the differing treatment of additional outlet revenues prior to and subsequent to the advent of rate regulation is a special circumstance that would not only permit, but would require a discrepancy between Lines 104 and 301.

8. In response, the State argues that it properly adjusted Intermedia's Line 104 entry on its FCC Form 393s in accordance with the Commission's applicable rules and precedent. The State points out that the Commission has previously stated that, absent special circumstances, an op-

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[6] *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[7] *Id.*

[8] *Id.*

[9] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994) (*"Second Recon. Order"*), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[10] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[11] Under the Commission's rules, cable operators should base rates for installation of additional outlets on costs in the same manner that they do with other installations. If the operator retains ownership of the equipment associated with such installations (e.g., the outlet), the cost of that equipment may be recouped in a monthly lease rate that must be cost-justified. Those installation and equipment costs are factored into the Line 301 amount. Prior to the advent of rate regulation, operators could charge subscribers a monthly fee for additional outlets that need not have been cost-justified.

[12] *See FCC Public Notice,* "Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements," Question and Answer No. 7 (released November 10, 1993) (*"November 10, 1993 Public Notice"*).

erator's entries for Lines 104 and 301 should be the same or nearly the same for operators who restructured their rates as of September 1, 1993, as InterMedia did.[13] The State asserts that no special circumstances exist which would justify InterMedia's Line 104 and 301 entries being substantially different. The State asserts that despite the instructions to FCC Form 393, InterMedia should have used "current" equipment revenues, rather than "prior" equipment revenues, in accordance with Commission policy as set forth in the *November 10, 1993 Public Notice*. The State asserts that InterMedia was not permitted to include additional outlet revenue in its Line 104 entry, because such revenue was no longer permissible after the Commission's cost-based equipment rules became effective on September 1, 1993. InterMedia's Line 104 entry was thus not representative of equipment revenues as of the initial date of regulation. Accordingly, it is the State's position that it properly equated InterMedia's entry on Line 104 with its entry on Line 301 in order to provide a more accurate representation of current revenue on Line 104.

9. InterMedia correctly points out that the instructions pertaining to Line 104 of FCC Form 393 specifically state that revenue earned over the last fiscal year, including revenue from additional outlet fees, should be used to determine an operator's monthly equipment revenue entry on Line 104.[14] However, in the *November 10, 1993 Public Notice*, we discussed the issue of the relationship between Lines 104 and 301 on FCC Form 393:

> The instructions for completing Worksheet I Line 104 of FCC Form 393 specify that equipment revenues for the year preceding [September 1, 1993] shall be used in computations of the current rate per channel which is to be compared to the benchmark. Revenues for the previous years may not be sufficiently representative where the operator has already unbundled and instituted cost-based pricing in accordance with our requirements. This answer clarifies that *in completing Line 104 operators must use equipment revenues that will be representative of the equipment rates that were in effect as of the initial date of regulation*. Where available, actual revenues should be used. Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations, we would anticipate that in most cases, absent special circumstances, operators will enter on Line 104 the same, or nearly the same, number as on Line 301. Line 301 is the anticipated revenues based on equipment rates derived in accordance with FCC rate regulations.[15]

Thus, because InterMedia restructured its rates on September 1, 1993, it was reasonable for the State to presume that InterMedia's entries for Lines 104 and 301 on its FCC Form 393s should be the same, or nearly the same.

10. InterMedia's assertion that its inclusion of additional outlet revenue in Line 104 amounts to a special circumstance which permits a discrepancy between its entries on Lines 104 and 301 is not convincing because the *November 10, 1993 Public Notice* seeks to ensure that operators did not include such revenues in Line 104. In completing Line 104, InterMedia must use equipment revenues that are representative of equipment rates in effect on the initial date of regulation. Additional outlet revenues generated from non-cost-based rates established prior to the initial date of regulation are not representative of rates in effect on the initial date of regulation. Because InterMedia's Line 104 entry included non-cost-based additional outlet revenue, it was not representative of its equipment rates in effect as of the initial date of regulation, as is required by the Commission's *November 10, 1993 Public Notice*.[16] Therefore, the State acted reasonably in equating InterMedia's entry on Line 104 with its entry on Line 301.[17] Accordingly, we deny this portion of InterMedia's appeal.

**B. Refund Timetable**

11. InterMedia next contends that the State's requirement that InterMedia issue refunds for overcharges within 15 days from the date the rate orders were adopted violates the Commission's procedural rules. InterMedia relies on language in our rules which, in the context of cable programming service rate orders, requires operators to issue rate reductions or refunds within 60 days from the date an order is released declaring rates unreasonable and mandating a remedy.[18] InterMedia also relies upon a recent Bureau order which held that a local franchising authority's 30-day refund implementation period was unreasonable.[19] The State, on the other hand, contends that because InterMedia had draft copies of the State's proposed rate orders as of December 23, 1994, InterMedia actually had 78 days to implement its refund plan. According to the State, this is ample time to allow for the preparation and distribution of notices and bills and to accommodate the demands of InterMedia's billing practices. The State also argues that neither the Commission's rules, nor *Times Mir-*

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[13] The State cites as support for this proposition the Commission's *November 10, 1993 Public Notice*, as well as several recent Orders promulgated by the Cable Services Bureau ("Bureau"). *See, e.g.*, In the Matter of Meredith Cable Television of North Suburban Roseville, Minn., DA 95-319 (Cab. Serv. Bur., released February 23, 1995).

[14] *See* FCC Form 393 at 10.

[15] *See November 10, 1993 Public Notice* (emphasis added).

[16] Because InterMedia's FCC Form 393s were filed with the State more than seven months subsequent to the issuance of the Commission's *November 10, 1993 Public Notice*, InterMedia should have known that the Commission intended that operators' entries on Line 104 of FCC Form 393 should be representative of equipment rates in effect on the initial date of regulation.

[17] As noted above, InterMedia's rates are not accurately justified because InterMedia's Line 104 entry, which relied upon pre-regulatory 1992 data, is not representative of its rates in effect as of its initial date of regulation, as required by the Commission. Accordingly, InterMedia is not entitled to rely upon the exception in the *Third Recon. Order* which permits operators to rely upon "old" data if its current rates are accurately justified using the old data and that data was accurate at the time. *See Third Recon. Order*, 9 FCC Rcd at 4349-50.

[18] *Rate Order*, 8 FCC Rcd at 5867-68.

[19] *See* In the Matter of Times Mirror Cable Television of Orange County, Inc. d/b/a Dimension Cable Services, DA 95-451 (Cab. Serv. Bur., released March 10, 1995) (*"Times Mirror Orange County"*).

*ror Orange County,* require that franchising authorities provide operators 60 days to implement refunds for basic tier overcharges.

12. The 60-day requirement, on which InterMedia relies, was specifically applicable to cable programming service rate reductions or refunds ordered by the Commission.[20] Our rules do not explicitly require franchising authorities to provide cable operators with 60 days to comply with local rate orders. We have stated that franchising authorities should consider the amount of time required to prepare and send notices and bills reflecting rate changes with particular attention paid to the impact of cycle billing, if applicable.[21] This instruction to franchising authorities is based on the same rationale we used in concluding that cable operators should have 60 days to implement a Commission order requiring refunds of cable programming service tier rates. Thus we find that, while a franchising authority may, in its discretion, specify a reasonable time period for compliance with its rate order, the time specified must be sufficient to allow preparation and distribution of notices and bills, and must accommodate the time demands of cycle billing. We have found that with respect to cable programming service tier rates such a time period was at least 60 days. We have no reason to believe that implementation of a local order should be any less time-consuming than the implementation of our orders.

13. The State's 15-day time limit on issuing refunds does not give InterMedia the opportunity to provide its subscribers notice, nor does it appear from the record below that the State gave proper consideration to other issues, such as whether InterMedia uses cycle billing. The State's argument that InterMedia actually had 78 days to comply because it had received drafts of the proposed rate orders on December 23, 1994 is not compelling. We have previously stated that draft local rate orders do not have the force of law.[22] Because a draft rate order does not have the force of law, and because such an order may be modified prior to the adoption of a final order, it would be inequitable to expect a cable operator to rely upon such a draft rate order. The State's rate orders, which do carry with them the force of law, provided that InterMedia had only 15 days within which to implement the refunds ordered by the State's rate orders. This portion of InterMedia's appeal is remanded to the State for resolution in accordance with the terms of this order. C. Refund Liability

14. InterMedia's refund liability period, as set forth in the rate orders, runs from January 10, 1994 to July 14, 1994. However, as noted in footnote 3, *supra,* the State's rate orders also allow for additional refunds to be ordered for the period of time between September 1, 1993 and January 9, 1994 in the event that the Commission grants the State's December 27, 1994 petition requesting a waiver of §76.942(b) of the Commission's rules. In its waiver request, the State requested that the Commission permit the State to extend InterMedia's refund liability back to September 1, 1993.[23] As noted in footnote 3, supra, the State's request for waiver of §76.942 of our rules is being denied in an order to be released simultaneously herewith.

15. Because the State's waiver request is denied, InterMedia will only be required to issue refunds for the period of time from January 10, 1994 to July 14, 1994. Because InterMedia does not contest this refund liability period, this portion of its appeal is dismissed as moot.

## IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the appeal filed by InterMedia IS DENIED with respect to that portion of the State's rate orders adjusting InterMedia's entry on Line 104 of its FCC Form 393s.

17. IT IS FURTHER ORDERED that the appeal filed by InterMedia IS REMANDED with respect to that portion of InterMedia's appeal regarding the State's requirement that InterMedia issue refunds within 15 days from the effective date of the State's rate orders.

18. IT IS FURTHER ORDERED that that portion of InterMedia's appeal regarding the State's attempt to order InterMedia to issue refunds for a period of time greater than one year IS DISMISSED as moot.

19. IT IS FURTHER ORDERED that, in light of the decision on its appeal herein, InterMedia's Emergency Petition for Stay is DISMISSED as moot.

20. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[20] *Id.; Rate Order,* 8 FCC Rcd at 5867-68.

[21] *See* In the Matter of Times Mirror Cable Television of Springfield, Inc. (Springfield, Illinois), 10 FCC Rcd 2340 (Cab. Serv. Bur., 1995); Questions and Answers on Cable Television Rate Regulation, Question/Answer 3 (released May 18, 1994).

[22] *See* In the Matter of Cablevision of Connecticut, Limited Partnership, DA 95-742 (Cab. Serv. Bur., released April 7, 1995). ("A local rate order carries with it the force of law, unlike a draft decision, which may simply be designed to give interested parties an opportunity to review and comment upon the franchising authority's proposed rate order, as then drafted.")

[23] InterMedia opposed the State's request in an opposition filed with the Commission on January 26, 1995. The State submitted a reply to InterMedia's opposition on February 3, 1995.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

STATE OF HAWAII DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, CABLE TELEVISION DIVISION,
Petitioner

v.

KAUAI CABLEVISION,
Respondent

Request For Clarification or Waiver of Section 76.942(b) of the Commission's Rules

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 8, 1995; Released: August 15, 1995**

By the Chief, Cable Services Bureau:

## I. BACKGROUND

1. On December 27, 1994, the State of Hawaii, through the Cable Television Division of its Department of Commerce and Consumer Affairs (the "State") filed with the Cable Services Bureau of the Federal Communications Commission (the "Bureau") a request for clarification or waiver of §76.942(b) of our rules.[1] In its request, the State seeks a waiver of §76.942(b) of our rules so that it may order Kauai Cablevision ("Kauai") to issue refunds to its subscribers, with interest, from September 1, 1993 to July 14, 1994, a period of time greater than the maximum one-year period allowed by §76.942(b) of our rules.[2] Kauai submitted an opposition to the State's request on January 26, 1995 in which it urged the Bureau to deny the State's request. The State submitted a reply to Kauai's opposition on February 3, 1995.

2. In its request, the State notes that although five of the seven cable operators within the State voluntarily consented to waivers of the Commission's one-year limitation on operators' refund liability periods, Kauai refused to consent to such a waiver.[3] The State contends that it was unable to issue rate orders governing Kauai's rates by September 1, 1994 because of an extension of time sought by Kauai, as well as the volume of work faced by the State as the sole regulator of cable television rates in the State.[4] Because the information sought by the State in its request for supplemental information was significant, the State's review of Kauai's FCC Form 393s was delayed until it received the additional information requested from Kauai. In order to protect subscribers' interests in potential refunds, the State sought Kauai's consent to a waiver of the one-year refund liability limitation set forth in §76.942(b) of our rules. Kauai refused to consent to such a waiver. It is the State's position that a grant of the State's request for a waiver of §76.942(b) of our rules is in the public interest.

3. Kauai asserts that the State has not met its burden of demonstrating that it is entitled to a waiver of our rules. Kauai contends that the State has failed to present any facts or circumstances that would warrant a waiver of our rules. Kauai further asserts that due to the State's tardiness in initiating the certification process, the State was unable to issue a rate order by September 1, 1994.[5] It is Kauai's position that the short extension of time from August 3, 1994 to August 31, 1994 which it received from the State in order to respond to the State's request for supplemental information is not adequate justification for the granting of a waiver in this case. Finally, Kauai contends that the grant

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[1] Section 76.942(b) of our rules states that "[a]n operator's liability for refunds is limited to a one-year period, except that an operator that fails to comply with a valid rate order issued by a franchising authority or the Commission shall be liable for refunds commencing from the effective date of such order until such time as it complies with such order."

[2] The State adopted rate orders governing Kauai's Princeville and Kalaheo systems on February 14, 1995. In these orders, the State ordered Kauai to issue refunds to its subscribers for the period of time between January 10, 1994 and July 14, 1994. However, the State's orders also provided that the State could order Kauai to issue additional refunds covering the period of time between September 1, 1993 and January 10, 1994 in the event that the instant request for a waiver of our rules is granted. Kauai appealed the State's rate orders on March 16, 1995. We are releasing simultaneously herewith an opinion and order addressing Kauai's appeals of the State's rate orders for its Princeville and Kalaheo systems. *See* In the Matter of InterMedia Partners, on behalf of Kauai Cablevision, L.P., DA 95-1745 (Cab. Serv. Bur., released August 15, 1995).

[3] The Commission has stated that franchising authorities and cable operators can mutually consent to extend the operator's refund liability period beyond the one-year maximum without advance Commission approval. *See* Letter from Meredith J. Jones, Chief Cable Services Bureau, to Continental Cablevision, 9 FCC Rcd 4453 (1994) (discussing extension of refund liability period). Although Kauai and the State attempted to work out a mutually agreeable extension of Kauai's refund liability period, they were unable to come to agreement upon such an extension. Request at 3. Initially, Hawaiian Cablevision Company also refused to consent to a waiver of the Commission's one-year refund liability limitation. However, the State and Hawaiian Cablevision have since reached an agreement regarding a waiver of the one-year refund liability limitation.

[4] On July 18, 1994, the State developed and sent to all cable operators within the State specific requests for supplemental information. Although the State requested that all responses be submitted to the State on or before August 3, 1994, Kauai received an extension of time until August 31, 1994. The State notes in its request that six of the seven operators in the State, including Kauai, sought extensions of time within which to submit their responses to the State's initial request for supplemental information.

[5] Kauai points out that the State did not initiate regulation of Kauai's rates until May 1994, despite the fact that the Commission adopted the certification process in May 1993. *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5685 (1993) (*"Rate Order"*). In its reply, the State notes that it initiated the certification process in September 1993, but was forced to seek two extensions of time from the Bureau in order to comply with certain requirements of the Hawaii Administrative Procedures Act. Reply at 2.

of a waiver in the instant case would "eviscerate" the rule which limits an operator's refund liability to a one-year period.

## II. DISCUSSION

4. The Commission may waive any provision of its rules either on its own motion or on petition if good cause is shown.[6] Because the instant case does not involve a waiver of the Commission's rules on its own motion, we will grant the State's request only upon a showing of the requisite good cause by the State.

5. As Kauai correctly points out, any party seeking a waiver of our rules "faces a high hurdle even at the starting gate."[7] In the instant case, it is our determination that the State has not presented arguments sufficient to justify a waiver of our rules regarding Kauai's maximum refund liability period. The State seeks a waiver of our rules in order to protect subscribers' interests in refunds dating back to September 1, 1993. However, it is necessary to balance the interests both of subscribers and of cable operators such as Kauai. In promulgating our rules regarding franchising authorities' power to order refunds, we considered the concerns voiced both by cable operators and franchising authorities.[8] After careful consideration of the views of these interested parties, we determined that, while the remedy of ordering refunds is available to franchising authorities, that power is not unlimited.[9] Accordingly, we concluded that an operator's refund liability would be limited to a period of one year.[10] This limitation was developed in order to avoid exposing cable operators to lengthy refund liability periods which could affect the viability of their systems.[11]

6. In the instant case, the State's arguments regarding the need for a waiver of our rules are not sufficiently compelling to overcome the limitation of refund liability expressed by the rule. First, whether other operators have entered into voluntary agreements with the State to extend their refund liability periods has no bearing on whether this operator must. As noted in footnote 3, *supra*, cable operators and franchising authorities are free to enter into such agreements; however, these agreements do not bind any entity which is not a party to such an agreement. Second, the State's argument that it was unable to issue a rate order governing Kauai's rates by September 1, 1994 because of an extension of time sought by Kauai, as well as the volume of work faced by the State as the sole regulator of cable television rates in the State is similarly unavailing. The State, for example, could have denied Kauai's request for an extension of time within which to submit the supplemental information requested by the State, or, in the alternative, it could have negotiated an extension of Kauai's refund liability period in light of its agreement to grant Kauai an extension of time within which to file the supplemental information requested by the State. Finally, the heavy workload faced by the State in its capacity as the sole regulator of cable television rates in the State does not constitute sufficient reason to subject Kauai to refund liability beyond the maximum period set forth in our rules.

7. As indicated in footnote 3, *supra*, we have recognized and indeed encouraged agreements by local franchising authorities and cable operators to extend the one-year refund liability period set forth in our rules. In the absence of such an agreement here, we cannot find that good cause exists to grant a waiver of these rules.

8. Because the State has failed to demonstrate that good cause exists for the grant of its waiver request, we will deny the State's request that we clarify or waive §76.942(b) of our rules. The State may not order Kauai to issue refunds for a period of time greater than the one-year maximum set forth in our rules.[12]

## III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the State's Request for Clarification or Waiver of §76.942(b) of our rules IS DENIED.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[6] 47 C.F.R. §1.3 (1994).

[7] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (1968)).

[8] *See Rate Order*, 8 FCC Rcd at 5724-5725.

[9] *See Rate Order*, 8 FCC Rcd at 5725.

[10] *See Rate Order*, 8 FCC Rcd at 5726; *see also* 47 C.F.R. §76.942(b). An operator's refund liability period is calculated as follows: (1) from the date an operator implements a prospective rate reduction back in time to September 1, 1993, or one year, whichever is shorter; or (2) from the date a franchising authority issues an accounting order, to the date a prospective rate reduction is issued, then back in time from the date of the accounting order to the effective date of the Commission's rate regulation rules; however, the total refund period shall not exceed one year from the date of the accounting order. 47 C.F.R. §76.942(c).

[11] *See Rate Order*, 8 FCC Rcd at 5726.

[12] *See* footnote 10 for an explanation of the one-year calculation.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI OF SOUTHEAST MISSISSIPPI

Appeal of Local
Rate Order of the City of
Ocean Springs, Mississippi

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 7, 1995; Released: August 15, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On June 22, 1994, TCI of Southeast Mississippi ("TCI") filed an appeal of a local rate order adopted on May 23, 1994 by its local franchising authority, the City of Ocean Springs, Mississippi (the "City"). The City did not file an opposition. In its rate order, based on the FCC Form 393[1] filed by TCI, the City established rates for basic tier service and associated equipment and installations and required King to refund overcharges to subscribers.[2]

2. TCI challenges the City's rate order with respect to the following issues. First, TCI argues that the City inappropriately determined that TCI violated the Commission's rate freeze, which was in effect from April 5, 1993 to May 15, 1994, and that, consequently, the rate order incorrectly sets TCI's permitted rates based on the rates that were in effect prior to the rate freeze rather than those rates that were in effect on the initial date of regulation. Second, TCI contends that the City's rate order impermissibly requires TCI to reduce its permitted per channel rate for certain channels carried on the basic service tier by 25 percent to account for certain basic tier channels delivered to subscribers at a level of "compromised quality"[3] and to account for the inclusion of "revenue producing" channels on the basic service tier.[4] Third, TCI claims that the City's rate order incorrectly disallows certain charges for the maintenance and repair of subscriber home wiring, including a charge based on its regulated hourly service charge and a charge based on an optional monthly wire maintenance fee. Finally, TCI asserts that the City, in calculating TCI's aggregate refund liability, must offset revenues received from rates above their maximum permitted levels with those rates that are below their permitted levels.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

## II. DISCUSSION

4. Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[9] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regula-

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[1] FCC Form 393 is the official form used by cable operators to determine whether their regulated rates for programming, equipment and installations were reasonable for the period beginning September 1, 1993 and ending May 15, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] *See* TCI Appeal, Exhibit 1, Rate Order at 17.

[4] The City defines "revenue producing channels" as "those channels that bring in revenue, either directly or indirectly, in addition to that received as a per channel charge. In the Ocean Springs system, these channels include Classified Ads, QVC, Preview Guide and Sneak Preview." TCI Appeal, Exhibit 1, Rate Order at 11.

[5] *See* 47 C.F.R. § 76.944.

[6] *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[7] *Id.*

[8] *Id.*

[9] To the extent that an operator has sought to take advantage of the refund deferral period available under our rules in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4183-4185 (1994) (*"Benchmark Order"*), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

tion ("current rate") or as of September 30, 1992.[10] After calculating actual aggregate revenues, the operator converts those revenues to a per channel rate, and then compares the per channel figure to the applicable benchmark rate. If an operator's current per channel rate level is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per channel rate level to the applicable benchmark rate. If its September 30, 1992 per channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10 percent, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

**A. Finding of Rate Freeze Violation**

6. In its rate order, the City found that TCI violated the Commission's rate freeze for cable service rates subject to regulation under the 1992 Cable Act.[11] As a consequence, the City based the calculations for TCI's permitted rates on the rates that were in effect on April 5, 1993, rather than those rates that were in effect on the initial date of regulation. TCI argues that it did not violate the Commission's rate freeze and that the City's attempt to remedy its alleged violation of the rate freeze by adjusting TCI's permitted rates is impermissible under the Commission's rules.

7. In the *Rate Freeze Order*, the Commission ordered that rates of cable services subject to regulation under the 1992 Cable Act be frozen as of April 5, 1993. The *Rate Freeze Order* sought to ensure that cable operators not continue to raise rates, pending implementation of cable service rate regulation.[12] The rate freeze also afforded local franchising authorities an opportunity to become certified to regulate the basic service tier and allowed consumers to become familiar with and to exercise their rights to invoke Commission oversight of cable programming service tiers.[13] The freeze was extended until May 15, 1994 in order to provide franchising authorities and other affected parties sufficient time to become familiar with pending modifications to the Commission's rate regulations before the freeze was lifted.[14]

8. The *Rate Freeze Order* required that the average monthly subscriber bill for cable services subject to rate regulation under the 1992 Cable Act could not increase above the rate level in effect on April 5, 1993. The freeze did not preclude cable operators from adding subscribers, programming offerings, equipment or other services as long as the average monthly subscriber bill was maintained during the freeze period.[15] In addition, the freeze did not preclude cable operators from "increas[ing] the charge for a tier or provision of equipment as long as the average monthly subscriber bill [did] not increase" during the freeze period. [16] The freeze thus permitted operators to make reasonable changes in the structure of their tiers of service in response to the Commission's rate regulations while still protecting consumers from overall rate increases.[17] In particular, the freeze was "intended to permit changes in individual rate components while constraining increases in overall rate levels."[18]

9. The rate freeze expired for all operators on May 15, 1994 and, with respect to any particular operator, on the date on which the operator's basic service tier became subject to regulation.[19] Even prior to May 15, 1994, then, the freeze no longer applied to a particular operator once its franchising authority became certified to regulate rates. Because a franchising authority's certification to regulate rates triggered the end of the rate freeze, franchising authorities lacked the authority to enforce the freeze. Moreover, the Commission's rules do not affirmatively grant franchising authorities the power to find violations of the rate freeze. Enforcement rests with the Commission.[20] Consequently, the City overstepped its regulatory authority by finding TCI's rates in violation of the Commission's rate freeze.

10. Moreover, local franchising authorities are obligated to follow the Commission's rules when reviewing an operator's rate filing. FCC Form 393 is used to review those rates in effect from the initial date of regulation until May 15, 1994. The initial date of regulation for review of basic service tier rates and associated equipment and installations is the date that a local franchising authority becomes certified with the Commission to regulate rates.[21] The City

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[10] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[11] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"), clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993) (*"Deferral Order"), Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993) *("November 10 Extension Order"); extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994) (*"February 8 Extension Order"*).

[12] *Rate Freeze Order*, 8 FCC Rcd at 2921.

[13] *Rate Freeze Order*, 8 FCC Rcd at 2921-22. *See also Clarification Order*, 8 FCC Rcd at 2918.

[14] *February 8 Extension Order*, 9 FCC Rcd at 1300.

[15] *Rate Freeze Order*, 8 FCC Rcd at 2921-22.

[16] *Id.*, 8 FCC Rcd at 2922.

[17] *Id.*

[18] *Clarification Order*, 8 FCC Rcd at 2918.

[19] *See February 8 Extension Order*, 9 FCC Rcd at 1300; *November 10 Extension Order*, 58 FR at 60142-43. In the *November 10 Extension Order* the Commission stated that the freeze would no longer apply to regulated cable services provided by cable operators whose basic cable service had become subject to rate regulation by a local franchising authority or the Commission. *Id.* at n.12.

[20] In establishing its authority to impose the rate freeze, the Commission noted that "Section 623(b)(1) of the Communications Act . . . provides sufficient authority for the Commission to freeze rates for the basic service tier. . . ." *Rate Freeze Order*, 8 FCC Rcd at 2921. The Commission has previously invoked its rate freeze enforcement powers against various operators. *See, e.g.*, C-TEC Cable Systems, et. al., 10 FCC Rcd 3358 (1995).

[21] The Commission's rate regulations became effective on September 1, 1993, which was the earliest date that a franchising authority could have become certified to regulate rates.

became certified to regulate rates on December 10, 1993. Therefore, TCI was obligated under the Commission's rules to justify the rates it offered on that date, subject to refund liability dating back to September 1, 1993, not the rates that were in effect on April 5, 1993, prior to the implementation of the rate freeze. We remand this issue to the City so that it can reconsider its ruling in a manner consistent with our findings.

**B. Reduction of Certain Per Channel Rates**

11. TCI contends that the City's rate order impermissibly requires TCI to reduce its per channel rate by 25 percent below its maximum permitted level for certain channels carried on the basic service tier.[22] The City imposed this reduction on TCI's rates to compensate for what the City considered to be compromised signal quality on certain channels, the lack of availability of those same channels to some subscribers without the use of a converter, and the inclusion of "revenue producing channels" on the basic service tier.[23] Specifically, the City found that the channels offering C-SPAN I and C-SPAN II, included by TCI as part of its basic service tier package, were of "unsatisfactory" signal quality. It further found that those channels were not available to some subscribers without the use of a converter. The City also found that four of the channels that TCI carried on its basic service tier were "revenue producing channels," or channels that brought in revenue to TCI from sources other than from customers' subscriptions to the basic service tier.[24] The City concluded that this additional revenue, as well as the signal quality problem and additional equipment needs, should be factored in TCI's rate calculations.

12. In its opposition, TCI argues that the signal quality delivered on the channels offering C-SPAN I and C-SPAN II on its system is satisfactory. Moreover, TCI claims no finding has been made that TCI has violated the Commission's technical requirements. With regard to the converter issue, TCI does not dispute that some subscribers must use a converter to receive the channels carrying C-SPAN I and C-SPAN II, but it contends that this is due to the limited capacity of the television sets being used by those particular subscribers rather than the signal it delivers to the subscribers' homes. TCI claims that because its system is in compliance with the Commission's technical standards and the converters are provided to subscribers at cost in accordance with the Commission's rules, it should not be penalized by a requirement to reduce its per channel rate below the level permitted under the Commission's rate rules. Finally, TCI claims that the City has no basis under the Commission's rules to treat "revenue producing channels" differently than any other channels carried on a regulated tier.

13. We agree with TCI. Our rules do not allow the City to make this type of ad hoc adjustment to TCI's basic service tier rate. The City must follow the Commission's rules for rate regulation when reviewing an operator's rate filing. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installation at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[25] In this proceeding, after correcting any disputed figures or calculations in TCI's Form 393, the City should allow TCI to charge its maximum permitted rates.

14. Neither signal quality issues nor concerns about equipment compatibility may be remedied through application of the Commission's rate regulations. Rather, signal quality is subject to our rules of technical standards[26] while equipment-related problems are addressed by our equipment compatibility rules.[27] Under our technical rules, every operator is under an affirmative obligation to ensure that its system complies with all of the pertinent quality standards throughout the system. To secure the operator's continuing compliance with these standards, we require the operator to conduct biannual performance tests of its system and to conduct any additional tests which may be requested by the Commission or the local franchising authority.[28] Under our rules for equipment compatibility, an operator is required to inform subscribers of potential compatibility problems and of methods for resolving those problems and to offer subscribers supplemental equipment to enable them to overcome those problems.[29]

15. A franchising authority may not arbitrarily reduce prices for programming and equipment below maximum permitted rate levels in a purported effort to address signal quality and equipment compatibility. TCI must be allowed to charge up to the maximum permitted rates derived by Form 393 for each regulated tier of service, each regulated piece of subscriber equipment and each regulated installation. Therefore, we find that the City was unreasonable in reducing TCI's per channel rate below its maximum permitted level for the two channels carrying C-SPAN I and C-SPAN II on the basic service tier.

16. Similarly, the City should not have reduced TCI's permitted per channel rate to compensate for "revenue producing channels" carried on the basic service tier. The Commission's rate regulations direct operators to derive a permitted per channel rate. Permitted rates for tiers of service are then calculated by multiplying the per channel charge by the total number of channels carried on each

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[22] The City reduced TCI's basic service tier rate by $0.86, representing a 25 percent reduction in the per channel rate for a total of 6 channels carried on the basic tier.

[23] *See* TCI Appeal, Exhibit 1, Rate Order at 17.

[24] *See* note 4 *supra*.

[25] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[26] *See* 47 C.F.R. §§ 76.601-630 (Subpart K - Technical Standards).

[27] *See* 47 C.F.R. § 76.630.

[28] 47 C.F.R. § 76.601(a), (c) and (d).

[29] *See* 47 C.F.R. § 76.630(e)(2)(i); Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment, First Report and Order, 9 FCC Rcd 1981 (1994) (*"Equipment Compatibility Order"*).

particular tier. The Commission's rules do not categorize particular channels as "revenue-producing" channels nor do they reserve special regulatory treatment for such channels in the Form 393 context.[30] The City must follow exclusively the Commission's rules in establishing an operator's permitted rates. Therefore, the City was unreasonable in reducing TCI's per channel rate for these particular channels. We remand this issue to the City so that it can reconsider its ruling in a manner consistent with our findings.

**C. Disallowance of Fees Related to Inside Wiring**

17. TCI objects to the City's disallowance of certain charges related to the repair and maintenance of home wiring, including an optional monthly maintenance fee and an hourly rate charged for each wire maintenance-related visit made to the customer's premises.[31] Subsequent to the filing of its Form 393, TCI began charging subscribers for the repair and maintenance of inside wiring. TCI emphasizes that customers could choose from the following four options for the maintenance and repair of inside wiring: (1) paying the regulated hourly service charge, (2) fixing the problem themselves, (3) contracting an outside party to do the work, or (4) paying a monthly wire maintenance fee. Prior to rate regulation, TCI asserts that wire maintenance was included in its rates for programming and equipment and provided to all customers at no extra cost. TCI argues that it began charging for the maintenance and repair of inside wiring to comply with the requirement that cable operators "unbundle" equipment and installation rates from the rates for the basic service tier.[32] In its rate order, the City rejected TCI's charges for wire maintenance, consisting of the option of an hourly service charge or a monthly maintenance fee, because it determined that the maintenance and repair of home wiring was previously offered to subscribers free of charge. The City further explained that requiring a charge for a service that was offered previously free of charge constitutes an unauthorized rate increase.

18. The 1992 Cable Act and the Commission's rules require that regulated equipment and installations be offered to subscribers at rate levels reflecting the operator's costs.[33] To establish these charges, the Commission's rules direct an operator to "unbundle" its charges for equipment and installations from its rates for programming services.[34] Therefore, charges that were bundled with programming rates prior to rate regulation may now appear as separately calculated and itemized charges.[35] Inside wiring is one example of such charges. Inside wiring is customer equipment,[36] the regulatory treatment of which depends upon who owns it. For example, if an operator installs inside wiring and retains ownership of that wiring, our rules specifically provide that the rate for the lease of that equipment must be justified in Part III of Form 393.[37] The lease rate for operator-owned wiring includes a component for maintenance costs.[38] Under those circumstances, TCI may not also charge its subscribers a separate wire maintenance fee.[39] On the other hand, if TCI's subscribers own their inside wiring, no lease rate would apply, but TCI's costs of providing any maintenance and repair of that wiring may be recovered through a service contract.[40] Our rules provide that charges for such service contracts must be based on the operator's hourly service charge ("HSC") multiplied by either the estimated average number or the actual number of hours for maintenance and repair.[41] However, the record in this appeal, with regard to the ownership of the inside wiring, is unclear.

19. If subscribers own their inside wiring, an operator may also charge a rate based on the operator's HSC for installation-related activities that were properly unbundled from its programming rates.[42] For example, an operator may choose to charge an hourly rate for the repair and maintenance of such inside wiring for each visit the operator makes to a subscriber's premises. In its rate order, the City did not find that TCI had improperly unbundled its wire maintenance charges from its programming rates. As long as TCI does not double charge its subscribers for the repair and maintenance of inside wiring by charging in-

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[30] Although the Commission's rules require that an operator's programming costs must be offset by any revenues received by the operator from programmers, this calculation is required only in computing increases to external costs after an operator's initial regulated rates have been established (*e.g.*, using Form 1210). *See* 47 C.F.R. § 76.922(d)(3)(x). Therefore, this requirement has no application in setting an operator's initial rates. In completing Form 393, an operator must determine its appropriate benchmark rate by categorizing each of the channels carried on its system according to whether they are regulated or non-regulated and whether they are satellite-delivered or not satellite-delivered. Form 393 at 11 (Instruction to Line 121). The Commission determined from a 1992 survey of cable industry rates that three key system characteristics played a large part in the variance of cable rates: the number of system subscribers; the number of channels offered by the system; and the number of satellite-delivered signals. *Rate Order*, 8 FCC Rcd at 5768. The Commission used the results of this survey to derive the benchmark formula. *Id.* The benchmark rates determined by the formula internalize any other system variances that existed at the time of the survey, such as the carriage of revenue-producing channels.

[31] This hourly rate was based on the hourly service charge derived in Part III of Form 393.

[32] *See* 47 C.F.R. § 76.923.

[33] Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3); 47 C.F.R. § 76.923.

[34] 47 C.F.R. § 76.923(b).

[35] *Rate Order*, 8 FCC Rcd at 5814-5817.

[36] *See* 47 C.F.R. §76.923.

[37] Under our rules, subscriber charges for inside wiring shall not exceed actual costs. *See* 47 C.F.R. § 76.923(a). Section 76.923(a) of our rules identifies equipment subject to price regulation as including but not limited to "other cable home wiring." Form 393, Part III provides space to compute maximum permitted rates for leased equipment which, per the form's instructions, includes "cable home wiring."

[38] *First Reconsideration Order*, 9 FCC Rcd at 1200.

[39] *See* 47 C.F.R. § 76.923(a)(4).

[40] *See* 47 C.F.R. § 76.923(i).

[41] *Id.* Rates for service contracts are subject to rate regulation for the same reason that sales of equipment are regulated. *See First Reconsideration Order*, 9 FCC Rcd at 1192. If we were to exempt service contracts from regulation, we could create a loophole that would allow operators to avoid our rules on equipment rates merely because of the form in which the equipment is offered to subscribers. Under our rules, the lease and maintenance of inside wiring owned by an operator is rate-regulated. An offer by the operator to maintain that wiring if it is owned by the subscriber must also be rate-regulated to close the loophole that would otherwise exist.

[42] *Id.*

dividual subscribers both a fee for the monthly wire maintenance plan and an hourly rate for each home visit, TCI may continue to offer both options to subscribers who own their inside wiring. Therefore, the City may not disallow TCI's use of its hourly service charge for the maintenance of subscriber-owned inside wiring or prohibit TCI from establishing a regulated monthly wire maintenance fee or restrict its ability to offer both options as mutually exclusive methods to recoup the costs associated with the repair and maintenance of inside wiring. Accordingly, we remand this issue to the City in order to allow TCI to clarify the facts regarding the ownership of inside wiring and to reconsider its ruling in a manner consistent with our findings.

**D. Disallowance of Refund Offsets**

20. TCI contends that the City's rate order does not calculate its refund liability correctly. TCI argues that the rate order does not allow TCI to offset its total refund liability for those rates exceeding their maximum permitted levels with those rates that were below their maximum permitted levels during the period of review. Specifically, TCI asserts that although the City's rate order correctly reports that TCI's rates for remote controls and converters exceeded their maximum permitted levels during the period of review, it fails to acknowledge that TCI's rates for installations were below their maximum permitted levels.

21. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[43] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[44] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[45] For instance, in this case, the City must offset or reduce any refunds it may order by the difference between the actual installation rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.[46] We remand this issue to the City so that it can reconsider its ruling in a manner consistent with our findings.

**III. ORDERING CLAUSES**

22. Accordingly, IT IS ORDERED that the appeal filed by TCI of Southeast Mississippi, with regard to TCI's alleged violation of the Commission's rate freeze, IS REMANDED to the City of Ocean Springs, Mississippi for resolution in accordance with the terms of this Memorandum Opinion and Order.

23. IT IS FURTHER ORDERED that TCI's appeal, with regard to the City's reduction of TCI's permitted per channel rate by 25 percent for certain channels carried on the basic service tier, IS REMANDED to the City of Ocean Springs, Mississippi for resolution in accordance with the terms of this Memorandum Opinion and Order.

24. IT IS FURTHER ORDERED that TCI's appeal, with regard to TCI's charges for the repair and maintenance of inside wiring, IS REMANDED to the City of Ocean Springs, Mississippi for resolution in accordance with the terms of this Memorandum Opinion and Order.

25. IT IS FURTHER ORDERED that TCI's appeal, with regard to the calculation of TCI's refund liability, IS REMANDED to the City of Ocean Springs, Mississippi for resolution in accordance with the terms of this Memorandum Opinion and Order.

26. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[43] *See* 47 C.F.R. § 76.942 (1993).

[44] *See Third Recon. Order,* 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.,* separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[45] *See Rate Order* at 5731; *Third Recon. Order,* 9 FCC Rcd at 4346. We note, however, that operators may not set programming service rates at higher than permitted maximum rates to recover lost equipment revenues when they voluntarily price equipment rates below their maximum permitted levels. To permit operators to do so would undermine Congress's intention to create a competitive market of cable equipment providers. *See* Communications Act, § 624A(c)(2)(C), 47 U.S.C. § 544A(c)(2)(C); *Equipment Compatibility Order,* 9 FCC Rcd at 1982.

[46] *See Third Recon. Order,* 9 FCC Rcd at 4353; TCI Cablevision of North Central Kentucky, Inc., 10 FCC Rcd 926 (1994).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SAMMONS COMMUNICATIONS, INC.

Appeals of Local Rate Order
of the City of Glendale, CA

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 8, 1995; Released: August 15, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On February 2, 1995, Sammons Communications, Inc. ("Sammons"), the franchisee in the above matter, filed an appeal of the local cable rate order ("rate order") adopted on January 3, 1994 by its franchising authority, the City of Glendale, California ("the City").[1] On February 14, 1995, the City filed an opposition to Sammons' appeal. Sammons did not file a reply. The rate order establishes a new regulated rate schedule for Sammons' basic service tier rates and associated equipment.[2] Specifically, the City's rate order requires Sammons to implement certain rate reductions and to issue refunds to subscribers, dating back to July 15, 1994.[3]

2. Sammons argues that the City, in prescribing the rate for basic service, misapplied the Commission's instructions to Line C2, Module C in FCC Form 1200. FCC Form 1200 instructs operators to indicate on Line C2 the number of regulated non-broadcast channels per tier.[4] Sammons asserts that the City erred in finding that one of its channels (*i.e.*, KTBN) should be classified as a broadcast channel as opposed to a non-broadcast channel. Even if the City's interpretation of the Commission's rules is correct, Sammons argues that its refund liability would not arise but for the operation of the must-carry rules, which Sammons contends are unconstitutional. Sammons urges the Commission to remand the City's rate order in light of the pendency of the legal challenge to the must-carry rules. In response, the City maintains that it correctly applied the Commission's instructions in FCC Form 1200, and that because the Commission's must-carry rules have not been declared unconstitutional by any competent court, they continue to remain in effect.

## II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

4. FCC Form 1200 is the official form used to determine whether initial regulated rates for programming are reasonable under the revised benchmark rules which apply to operators beginning May 15, 1994 or upon the expiration of the deferral period providedunder our rules for operators to comply with the revisions to our rules.[9] Through the use of Form 1200, an operator generally calculates three sets of figures: (1) the operator's actual March 31, 1994 rate level; (2) the operator's March 31, 1994 benchmark rate level; and (3) the operator's "full reduction" rate level. These figures are used to derive an operator's maximum initial permitted rates.

5. The operator first completes Module A of the Form 1200 to calculate its March 31, 1994 per subscriber monthly regulated revenue. Next, the operator completes Module B to calculate changes in external costs which the operator is entitled to reflect in its rates, but which have not yet been passed through to its subscribers. In Module C the operator enters its data with respect to a number of variables to calculate its March 31, 1994 benchmark rate level on a per subscriber, per month basis. The operator's March 31, 1994 actual rate level (Module A plus external costs calculated in Module B) is then compared to the benchmark rate level derived in Module C, with the operator carrying forward the smaller of the two. If the March 31, 1994 actual rate level is smaller, the operator completes Module D, subtracting the monthly per subscriber equipment cost calculated in Form 1205 and adding external costs calculated from Module B. If the benchmark rate level is smaller, the operator completes Module E, subtracting the monthly per subscriber equipment cost tak-

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[1] With its appeal, Sammons also filed a Request for Stay of the City's rate order, pending Commission resolution of this appeal. Because we reach the merits of Sammons' appeal in this order, the request for stay will be dismissed as moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] *See* City's Rate Order at 2 (copy of local rate order found in Appeal, Exhibit H).

[4] *See* FCC Form 1200 at 16.

[5] *See* 47 C.F.R. § 76.944.

[6] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Report and Order"*); Third Order on Reconsideration in MM Docket 92-266, FCC 94-40, 9 FCC Rcd 4316, 4345 (1994) (*"Third Recon. Order"*).

[7] *Id.*

[8] *Id.*

[9] *See* Second Order on Reconsideration, Fourth Report and Order, Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119 (1994) (*"Second Recon. Order"*).

en from Form 1205. Depending on which is used, either Module D or E establishes per-tier rates, which the operator carries forward into Module F, as its so-called provisional rates.[10]

6. In the second part of Form 1200, the operator derives its full reduction rate based on its September 30, 1992 rates. To compute this rate, in Module G, the operator calculates its September 30, 1992 total monthly regulated revenues per subscriber, reduces that amount by 17%, and adjusts upward by 3% to reflect the inflation from September 30, 1992 until September 30, 1993. In Module H, the operator then adjusts the results from Module G for changes since September 30, 1992 with respect to the number of regulated channels carried. In Module I, the operator subtracts a monthly per subscriber equipment cost amount from Form 1205, establishes per-tier rates, and adjusts for changes in external costs. In Module J, the operator compares its aggregate provisional rate with its aggregate full reduction rate. The maximum permitted rates an operator is actually allowed to charge are either the provisional rates (Module F) or the full reduction rates (Module I), depending on whether the aggregate provisional rate is greater or less than the aggregate full reduction rate. The maximum permitted rates are entered into Module K. In addition to Form 1200, an operator may file Form 1210, up to quarterly, to claim changes in external costs, the number of regulated channels and inflation that justify rate increases.

### A. Line C2 of Form 1200

7. In computing its benchmark rate level in Module C, an operator is required to provide entries for the various benchmark variables. The benchmark formula is intended to derive a rate level which approximates the level a similarly situated operator subject to competition would charge. The benchmark rate level is based on the benchmark variables, which include, for example, the number of subscribers, the number of regulated channels, and the number of additional outlets charged.[11] The benchmark formula's only function in the new system is to determine which operators are "low-priced" operators subject to transition relief and therefore not required to set their rates based on their full reduction rates.[12] An operator with (i) a current, *i.e.*, March 31, 1994, rate level below the benchmark rate level or (ii) a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark, is a low-priced operator.[13] The low-priced operator with a current rate level below the benchmark generally does not have to reduce its rate level, and the low-priced operator with a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark is required to reduce its rate level only to the benchmark.[14]

8. Included among the variables used in the benchmark formula is the number of regulated non-broadcast channels per tier. FCC Form 1200 instructs the operator to indicate in Module C, Line C2, the number of regulated non-broadcast channels per tier as of March 31, 1994. FCC Form 1200 defines non-broadcast channels as "channels other than broadcast signals that are receivable off-the-air by the cable system. For purposes of this definition, broadcast signals received via satellite or relayed to the cable system via microwave *and* not receivable off-the-air by the cable system are considered non-broadcast signals."[15] According to the City's consultant, classifying KTBN as a broadcast channel as opposed to a non-broadcast channel has the effect of reducing Sammons' basic service tier rates.[16]

9. According to the City, Sammons counted local station KTBN as a non-broadcast channel on its Form 1200,[17] which the City contends is inconsistent with FCC instructions for Line C2, which provide that a channel is not a non-broadcast channel if it is also "receivable off-the-air by the cable system."[18] The City and its consultant told Sammons that it appeared to them that KTBN can be received off-the-air by Sammons' cable system in the City. The City then requested that Sammons provide justification for its designation of KTBN as a non-broadcast channel on its Form 1200. Sammons responded, but the City asserts that Sammons' response was inadequate since it did not address the specific instructions to Line C2 of Form 1200, but rather was an historic commentary regarding the history of reception problems relating to KTBN. According to the City, it made further requests for justification, but Sammons' responses continued to be inadequate.[19] The City charges that Sammons failed to provide reasonable proof that KTBN could not be received off-the-air by its cable system at the time of the Form 1200 filing.

10. Sammons, on the other hand, argues that the City, in its rate order, incorrectly found that KTBN should be classified as a broadcast channel. Sammons maintains that it properly counted KTBN as a non-broadcast channel since KTBN was received by its system via satellite and it was not aware that its system couldreceive the signal off-

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[10] At the time of the local rate order, a so-called "small operator" could elect "transition relief," which allowed it to keep its regulated revenue at its March 31, 1994 levels, and so was not required to complete its benchmark in Module C and its provisional rates were determined by completion of Module D. Pursuant to the Commission's Sixth Report and Order and Eleventh Order on Reconsideration in MM Docket Nos. 92-266 and 93-215, FCC 95-196, at ¶ ¶ 40-42 (released June 5, 1995) (*"Small Systems Order"*), small systems eventually will have to convert to some other form of regulation, *i.e.*, by establishing rates in accordance with our benchmark or cost-of-service rules (the latter of which include the small system cost-of-service regulations adopted in the *Small Systems Order*).

[11] *See Second Recon. Order*, 9 FCC Rcd at 4177-4178.

[12] *See* 47 C.F.R. § 76.922.

[13] *Id.*

[14] *Id.*

[15] FCC Form 1200 at 16 (emphasis added). A Benchmark Fact Sheet further explaining our instructions for calculating an operator's benchmark rate restates this instruction. *See* Fact Sheet, *Benchmark Fact Sheet* at 1-2 (April 29, 1994).

[16] The City's consultant notes in its report that designating local station KTBN as a broadcast channel, as opposed to Sammons' designation of it as a non-broadcast channel, "would have the impact of reducing the rates for Basic Service (Lifeline) by $0.08 per month and Tier 2 (Tier) by $0.07 per month." Appeal, Exhibit D (TMC Report at 3).

[17] *See* Appeal, Exhibit D (TMC Report at 3). KTBN is channel 12 in Sammons' channel line up, and is channel 40 off-the-air. *Id.*

[18] *See* note 15, *supra*.

[19] *See* Opposition at 3-6.

the-air at the time it filed Form 1200. Sammons argues that because KTBN did not provide good quality off-the-air signal in the past, its determination that KTBN would not be receivable off-the-air at the time it filed Form 1200 was reasonable. Sammons, however, notes in its Appeal that, it "has since learned, after experiencing quality problems with the satellite feed, that KTBN's off-the-air signal quality has improved. Accordingly, in November of 1994 Sammons switched its carriage of KTBN to the off-the-air signal."[20] Nevertheless, Sammons insists that it properly listed KTBN as a non-broadcast channel on its Form 1200 since, at the time of the Form 1200 filing, KTBN was received by Sammons via satellite.

11. We find that the City's decision is consistent with our instructions for Line C2 of Form 1200 and reasonable. The Form's instructions provide that a channel is not classified as a non-broadcast channel if it can also be received off-the-air by the cable system, notwithstanding that it is a broadcast signal actually received via satellite by the system.[21] Based on the evidence in the record, we conclude that it was not unreasonable for the City to find that Sammons did not provide adequate proof that KTBN could not be received "off-the-air" by its cable system. There is nothing in the record to indicate that Sammons presented any evidence as to whether KTBN could be received over the air in March, 1994. We will, therefore, affirm the City's rate order on this issue.

**B. Must-Carry**

12. Sammons asserts that the rate order should be overturned on the ground that mandatory carriage of KTBN, which is required under the Commission's must-carry rules, is unconstitutional. The must-carry provisions of the 1992 Cable Act require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations.[22] The constitutionality of the must-carry provisions of the 1992 Cable Act is the subject of continuing litigation in the federal courts.[23] While the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules. Despite that, Sammons appears to request in its appeal that we remand the rate order back to the City, given the pending legal challenge to the must-carry rules, on the theory that if the must-carry rules are declared unconstitutional by the federal courts, then Sammons would not incur any refund liability. The result that Sammons envisions with respect to the existing litigation surrounding the must-carry rules, however, is mere speculation. We must base our decision on the applicable laws that are currently in effect. Additionally, no court of competent jurisdiction has ordered the Commission to stay the enforcement of the must-carry rules. We will therefore deny Sammons' request with respect to this issue.

**III. ORDERING CLAUSES**

13. Accordingly, IT IS ORDERED that Sammons Communications; Inc.'s appeal of the local rate order of the City of Glendale, California IS DENIED.

14. IT IS FURTHER ORDERED that the Request for Stay of the City of Glendale's rate order filed by Sammons Communications, Inc. IS DISMISSED as moot.

15. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[20] Appeal at 6 n.4.
[21] *See* paragraph 8, *supra*.
[22] *See* Communications Act, §§ 614-615, 47 U.S.C. §§ 534-535.
[23] *See* Turner Broadcasting Systems, Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993), *vacated*, 114 S. Ct. 2445 (1994) (case remanded to three-judge panel of the U.S. District Court for the District of Columbia for further proceedings).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

KIFM Broadcasting, L.P. File No. BRH-900730A2

For Renewal of License of
Station KIFM(FM)
San Diego, California

Midwest Television, Inc. File Nos. BR-900731D6
BRH-900731D5

For Renewal of Licenses of
Stations KFMB(AM)/KFMB-FM
San Diego, California

Santa Monica Community College File No. BRED-900726YF

For Renewal of License of
Station KCRW(FM)
Santa Monica, California

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 27, 1995; Released: August 16, 1995**

By the Commission:

## I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the four captioned radio stations;[1] (ii) three Petitions to Deny timely filed on November 1, 1990, by the National Hispanic Media Coalition and various declarants (hereinafter "NHMC") against the above-captioned renewal applications; (iii) the licensees' oppositions to the petitions; (iv) the licensees' responses to Commission inquiries; and (v) various other pleadings.

## II. BACKGROUND

2. The NHMC alleges that the challenged stations violated our EEO Rule and policies. Accordingly, they request that we conduct an investigation of the employment practices of the stations pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) and designate the renewal applications for hearing.

## III. PLEADINGS

3. *Standing.* In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show ... that a grant of the applications would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. §309(d)(1). *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline); Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. §309(d)(1).

4. Timely filed with the petitions to deny were declarations under penalty of perjury from members of the NHMC, who are residents of the stations' service areas. They comply with the requirement for establishing standing for the NHMC. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). We find, therefore, that the challenges filed by the NHMC constitute valid petitions to deny against KIFM(FM), KFMB(AM)/KFMB-FM, and KCRW(FM).

5. *Prima Facie Case.* The NHMC derived its factual allegations from the licensee's EEO program and annual employment reports. Review of each licensee's EEO record led us initially to conclude that the NHMC presented a *prima facie* case demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. §309(d)(1). *Astroline, supra.*[2] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont); Bilingual, supra.*

6. However, subsequent review of the NHMC's EEO allegations, as well as each licensee's renewal applications, oppositions and inquiry responses, leads us to conclude that there are no substantial and material questions of fact warranting designation for a hearing. In addition, we find no evidence that any licensees engaged in discrimination. Thus, grant of the applications will serve the public interest. 47 U.S.C. §309(d)(2). *Astroline, supra.* Accordingly, we will grant renewal, but with appropriate remedies.

## IV. DISCUSSION

7. Section 73.2080 of the Commission's Rules, 47 C.F.R. §73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an EEO program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of

[1] The license term ended on December 1, 1990.

[2] The licensees are reminded that under our EEO Rule, 47 C.F.R. § 73.2080, they have an obligation to recruit for females and minorities for each vacancy. To the extent that the licensees' recruitment efforts were inconsistent, female, as well as minority, recruitment was affected.

discrimination by the licensee. See Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. §§73.2080(b) and (c).

8. When the renewal application indicates an absence of evidence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies and sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 2 FCC Rcd 3967 (1987); *see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra. KIFM(FM), San Diego, CA*

9. Review of the licensee's renewal application, opposition and inquiry responses reveals that the station had six full-time hiring opportunities, including three for upper-level positions, from April 1, 1989, through September 10, 1990.[3] In its renewal application, the licensee reports contacting the following general sources and receiving the cited number of minority referrals: the *San Diego Union* (12), the *Voice and Viewpoint* (0), City College (2), six other local colleges and universities (0), Refugee Resettlement (1), the Employment Development Department (2), Veteran Job Service (2), 10 other general outside sources (0) and current employees (4). The licensee also reports contacting the following minority sources and receiving the cited number of minority referrals: *La Prensa* (0), *Ahora Now* (0), the Urban League (2), and 11 other minority sources (0). In addition, the licensee states that it received one minority referral from the *San Diego Woman* and no minority referrals from three other women's organizations. The licensee asserts that it contacted at least 12 general, six minority and two women's sources for each of the six vacancies.

10. Thirty-seven (27%) of 136 applicants and 13 (34%) of 38 interviewees for the six jobs filled by the licensee were minorities. Minorities were in the applicant and interview pools for five of the six overall positions and two of the three upper-level positions. The licensee indicates that, out of a total of six hires, it hired one Black and two Hispanics, all for lower-level positions, during its tenure as licensee.[4] The licensee states that it contacts the sources listed in its renewal application quarterly, as well as when vacancies occur. Follow-up telephone calls to the sources are made to confirm receipt of, and check the response to, job notices. The licensee asserts that it reviews its applicant summary form quarterly to evaluate the station's outreach efforts.[5]

11. The NHMC argues that the licensee has failed to implement a legally adequate program for the employment of Hispanics and other minorities and has failed to meaningfully self-assess its program. The NHMC contends that the station's 1990 Annual Employment Report reflects serious underemployment of minorities, especially Hispanics, the dominant and fastest growing minority group in the local labor force. The NHMC also contends that the license renewal application reflects gross inadequacies in KIFM(FM)'s EEO program because the application lists a total of only nine minority referrals among all outside recruitment sources. The NHMC concludes that the licensee apparently obtained no minority referrals for many of its hiring opportunities. The NHMC argues that the licensee has not addressed its failure to employ minorities, especially Hispanics, adequately in upper-level positions. The NHMC argues that this station's record is more egregious than that of the station in *WROV Broadcasters, Inc.*, 4 FCC Rcd 6157 (1989) (*WROV*).

12. The licensee responds that the NHMC relied on insufficient information to draw generalizations and ignored relevant information. It urges that, in fact, its EEO program is exemplary. The licensee contends that the station's 1990 Annual Employment Report primarily reflects the employment record of the previous licensee, the present licensee having had less than a year for its recruitment efforts to have any impact. It argues that the NHMC ignored information in the renewal application which indicates that the licensee hired minorities for six of 11 vacancies during the renewal year,[6] and received a total of 22 minority referrals from sources -- not nine as claimed by the NHMC -- during the renewal year. The licensee states that it has maintained detailed applicant flow records, and, contrary to the NHMC's argument, self-assessed its EEO program, and added more sources to its recruitment list. The licensee contends that this last claim is supported by the fact that its 1984 assignment application[7] listed only ten recruitment sources that it proposed to contact and its 1990 renewal application listed 40 sources that it had contacted during the renewal year. It also states that the NHMC failed to respond to two letters that the licensee sent in April and September of 1990 asking if the organization would like to be added to the station's recruitment list.[8] The licensee contends that full-time minority representation at the station has increased from 0% (no minorities) on April 1, 1989, the day it took control of the station, to 10.7% (two Hispanics and one Asian/Pacific Islander) as of October 31, 1990.

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[3] The San Diego, California Metropolitan Statistical Area (MSA) is 43.6% female and 22.6% minority (4.5% Black, 13.4% Hispanic, 4.1% Asian/Pacific Islander and .6% American Indian). The station's 1990 Annual Employment Report lists 16 females (55.2%) and two minorities (one Hispanic and one Asian/Pacific Islander) (6.9%) on an overall staff of 29, and ten females (43.5%) and one Asian/Pacific Islander (4.3%) on an upper-level staff of 23. The licensee took control of the station on April 1, 1989.

[4] In addition to the above-mentioned hires, the licensee asserts that it offered an upper-level position to an Asian/Pacific Islander but she declined the offer. In addition, the licensee indicates that it hired an Asian/Pacific Islander, who was working as an intern at the station, for a part-time upper-level position and later promoted him to full-time.

[5] The applicant summary form includes information on the date of hire, position applied for, and the race, gender, and referral sources of an applicant.

[6] These figures reflect full and part-time hires combined.

[7] The licensee filed its assignment application in 1984 after the former licensee had been denied renewal of license in a hearing. Due to that licensee's appeals of the decision and the appointment of an interim licensee, the present licensee did not take control of the station until April 1, 1989.

[8] The licensee attached copies of these letters to its opposition.

13. The licensee argues that its EEO record is better than that of the licensee in *WROV, supra.* We agree. The licensee of WROV used recruitment sources for only seven of 65 full-time vacancies and used only three recruitment sources sporadically. In addition, there was no indication that the licensee engaged in analysis of its EEO efforts. In contrast, the licensee of KIFM(FM) states that it uses its recruitment list for every opening, maintains detailed records of the results of its EEO program and continually updates its list of recruitment sources.

14. There are no substantial and material questions of fact to warrant designation for hearing. *Astroline, supra.* Moreover, there is no evidence that the licensee engaged in employment discrimination. The licensee contacted recruitment sources, including minority organizations, for every vacancy; attracted minority applicants for all but one vacancy; hired minorities for 50% of its positions; and kept complete records of its EEO efforts. Therefore, we will grant renewal unconditionally.

**KFMB(AM)/KFMB-FM, San Diego, CA**

15. Review of the licensee's renewal application and consolidated opposition/inquiry response reveals that the stations had 14 full-time hiring opportunities, including 11 for upper-level positions, from July 15, 1987, through October 1, 1990.[9] In its renewal application, the licensee indicates that it contacted the following general sources, receiving the cited number of minority referrals: the *San Diego Voice and Viewpoint* (0), eight local universities and colleges (10), Regional Occupational Program (0), the NAB Job Bank (0), employees (3), competing stations (5), trade papers (1), *Radio and Records Magazine* (7), word of mouth, walk-ins, etc. (7). The licensee also claims that it contacted the following minority and women's sources and received the cited number of minority referrals: *Asian American Times* (0), *El Sol de San Diego* (0), *La Prensa* (0), the Chicano Federation of San Diego (2), nine other minority organizations (0) and three women's organizations (0). The licensee indicates in its inquiry response that it also contacted the Veterans Administration Job Service, the MAAC Project, and the CBA Job Bank during the license term. The licensee states that it contacted at least 19 general, ten minority and three women's sources for each of five of its 14 vacancies and at least 19 general, one women's and three minority sources for each of five additional vacancies. The licensee did not actively recruit for the remaining four vacancies. The licensee notes that it did not recruit for three of the four positions because it was hiring unique broadcast talents: two morning announcers and a producer. It contends that these individuals were hired because they were available, not to fill any specific vacancy. We note that the producer hired was an Asian male. For the remaining position, the licensee gives no explanation for failing to actively recruit.

16. The licensee did not know the number, race or gender of interviewees for three positions. The licensee states that, except for one of the remaining positions, all applicants were interviewed. Regarding that one position, the licensee states that it did not record the race of the applicants. For the ten positions with applicant data, 38 of the 150 applicants were minority (13 Blacks, 23 Hispanics and two Asian/Pacific Islanders) and minorities were in the applicant pool for six of the ten positions. For the 11 positions with interview data, 46 of the 171 interviewees were minority (17 Blacks, 24 Hispanics and five Asian/Pacific Islanders) and minorities were in the interview pool for seven of the 11 positions. The licensee hired one Black for a lower-level position, and two Asian/Pacific Islanders, one Black, and one Hispanic for upper-level positions, out of the 14 positions filled during the period under review.

17. In its renewal application, the licensee describes several scholarships that it provides annually for certain local colleges and universities including three scholarships at San Diego City College that are specifically designated for the professional training of women and minority community members pursuing degrees in telecommunications, journalism or electronics. The scholarships may include part-time employment at the stations if it is available. The licensee also includes the stations' current list of recruitment sources, which includes 20 general, 11 minority, and three women's sources and which it states is periodically reviewed, with new sources added and unproductive sources deleted.

18. The NHMC argues that the licensee failed to implement a legally adequate program for the recruitment of Hispanics and other minorities and failed to meaningfully self-assess its program. The NHMC argues that the 1990 Annual Employment Report reflects serious underemployment of minorities, especially Hispanics. It states that the licensee's application lists no minorities promoted, no minority referrals from local media sources, and

[9] The San Diego, California MSA is 43.6% female and 22.6% minority (4.5% Black, 13.4% Hispanic, 4.1% Asian/Pacific Islander and .6% American Indian). The stations' 1984 Annual Employment Report lists 19 females (35.2%) and five minorities (two Blacks and three Hispanics) (9.3%) on an overall staff of 54 and 12 females (27.3%) and five minorities (11.4%) on an upper-level staff of 44. In 1985, 21 females (37.5%) and five minorities (one Black and four Hispanics) (8.9%) were employed on the stations' overall staff of 56 and 12 females (28.9%) and four Hispanics (8.9%) were employed on an upper-level staff of 45. In 1986, the stations employed 19 females (35.8%) and six minorities (two Blacks and four Hispanics) (11.3%) on an overall staff of 53 and 11 females (25.0%) and five minorities (one Black and four Hispanics) (11.4%) on an upper-level staff of 44. In 1987, the stations employed 20 females (37.7%) and five minorities (one Black and four Hispanics) (9.4%) on an overall staff of 53 and 13 females (29.5%) and five minorities (11.4%) on an upper-level staff of 44. In 1988, the stations employed 20 females (35.7%) and five minorities (one Black and four Hispanics) (5.9%) on an overall staff of 56 and 11 females (25.6%) and five minorities (11.6%) on an upper-level staff of 43. In 1989, the stations employed 25 females (41.0%) and five minorities (one Black and four Hispanics) (8.2%) on an overall staff of 61 and 17 females (34.7%) and five minorities (10.2%) on an upper-level staff of 49. The stations 1990 Annual Employment Report indicates that, as of March of that year, the stations employed 24 females (40.7%) and seven minorities (two Blacks, four Hispanics, and one Asian/Pacific Islander) (11.9%) on an overall staff of 59 and 15 females (32.6%) and six minorities (one Black, four Hispanics and one Asian/Pacific Islander) 13.0%) on an upper-level staff of 46. The licensee indicated in its opposition/inquiry response that, as of November 1990, it employed 26 females (41.3%) nine minorities (three Blacks, four Hispanics and two Asian/Pacific Islanders) (14.3%) on an overall staff of 63 and 18 females (36.0%) and eight minorities (two Blacks, four Hispanics and two Asian/Pacific Islanders) (16.0%) on an upper-level staff of 50.

only two minority referrals from 16 local minority and women's organizations during the renewal year. The NHMC argues that the licensee has not proposed reforms to its inadequate minority recruiting program. The NHMC also argues that this station's record is more egregious than that of the station in *WROV, supra.*

19. In response, KFMB(AM)/KFMB-FM contends that it has a healthy and vigorous EEO program which has been administered in good faith and in compliance with Commission rules and policies. It argues that the NHMC's conclusions are based on a highly selective and incomplete statistical analysis, at best, and, at worst, misleading conclusions. In response to the NHMC's argument that the licensee did not promote any minorities during the renewal year, the licensee points out that it promoted only one individual during that period. In response to the NHMC's argument that the licensee received few minority referrals during the renewal year from certain sources, the licensee points out that the other sources listed on the renewal application yielded 33 minority referrals during the renewal year. Regarding self-assessment, the licensee states that, in March 1989, it took certain steps to improve its EEO program, including the establishment of a management level EEO committee to review the hiring procedures for all openings and the implementation of a system to consistently update the recruitment list. The licensee contends that its employment of minorities has increased over the license term due in large part to the licensee's monitoring and adapting its EEO program to ensure continued progress.[10]

20. There are no substantial and material questions of fact to warrant designation for a hearing. *Astroline, supra.* Moreover, there is no evidence that the licensee engaged in employment discrimination. The licensee contacted recruitment sources, including minority organizations, received minority referrals, interviewed minority applicants and hired minorities for overall and upper-level positions. Therefore, we find that renewal of the licenses is in the public interest. We find that, contrary to the NHMC's argument, the EEO record in this case is less egregious than that of the station in *WROV, supra.* The licensee in this case contacted a large number of recruitment sources for most of its vacancies and engaged in self-assessment of its EEO program. However, the licensee failed to actively recruit or maintain applicant data for every opening. Accordingly, we caution the licensee to contact sources likely to refer qualified minority applicants when vacancies occur and to maintain complete applicant flow records.

**KCRW(FM), Santa Monica, CA**

21. Review of the licensee's renewal application and consolidated opposition/inquiry response reveals that the station had five full-time hiring opportunities,[11] all for upper-level positions, from July 1, 1987, through June 30, 1990.[12] According to its renewal application, the licensee contacted, but received no minority referrals from, the following sources: four local print and broadcast media outlets, "[a]ll Community Colleges and universities in California" and "200+ community agencies, including women's, minority, disabled, and senior citizen organizations." The licensee states that it contacted these sources, which included 95 minority organizations, for all five full-time hires occurring during the period under review.

22. Thirty-eight out of 130 applicants for the five positions were minorities (25 Blacks, six Hispanics and seven Asian/Pacific Islanders), and six out of 33 interviewees were minorities (five Blacks and one Asian/Pacific Islander).[13] Minorities were in the applicant pool for all five vacancies and in the interview pool for four of the five vacancies. The licensee hired one Asian/Pacific Islander for an upper-level position out of five positions filled during the three year period under review.

23. The NHMC contends that the licensee failed to implement a legally adequate program to employ Hispanics and other minorities and failed to meaningfully self-assess its inadequate EEO program. The NHMC asserts that the station's Annual Employment Reports during the license term reflect serious underemployment of minorities and argues that the licensee's failure to employ any Hispanics, the dominant and fastest-growing minority group in Los Angeles, raises a *prima facie* case of discrimination. It also argues that the licensee's renewal application reflects manifest inadequacies in the licensee's EEO program because the application lists no minority referrals from local media, schools, or minority/women's organizations. The NHMC contends that the licensee proposed no reforms to its program despite the failure of existing sources to produce minority applicants. The NHMC also argues that this station's record is more egregious than that of the station in *WROV, supra.*

24. In response, the licensee states that, like many public radio stations, it has a limited budget and many of its administrative services, including personnel, are performed by the College administration. In addition, the licensee points out that the station is relatively small, with only 12 full-time permanent employees and very little turnover. Moreover, the Santa Monica College District's formal hiring procedures, which included contacting 95 minority agencies, of which 27 are Hispanic, were followed for every opening.[14] The station argues that it received a significant

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[10] The licensee correctly points out that the employment figures cited by the NHMC as being from the stations' 1990 Annual Employment Report were actually from the stations' 1989 Report.

[11] The licensee indicates that it filled only temporary positions during the renewal year.

[12] The Los Angeles-Long Beach, California MSA is 41.9% minority (10.8% Black, 24.4% Hispanic, 6.1% Asian/Pacific Islander and .6% American Indian). The stations 1984 and 1985 Annual Employment Reports list three females (37.5%) and one Black (12.5%) on an overall and upper-level staff of 8. In 1986 and 1987, the station employed three females (33.3%) and one Black (11.1%) on an overall and upper-level staff of 9. In 1988, the station employed four females (40.0%) and one Black (10.0%) on an overall and upper-level staff of 10. In 1989 and 1990, the station employed six females (50.0%) and two minorities (one Black and one Asian/Pacific Islander) (16.7%) on an overall and upper-level staff of 12.

[13] The licensee indicates that the race of one interviewee was unknown.

[14] In its opposition, the licensee attaches a copy of Santa Monica Community College's Affirmative Action Plan. The plan provides that "[a]ll permanent positions shall be advertised by the Personnel Department and numerous sources shall be contacted to assist in developing a diverse applicant pool."

number of minority referrals as a result of these contacts. The licensee acknowledges that it has had difficulty recruiting and hiring Hispanics, but points out that it has taken steps to improve its record in this respect. After the reporting period but before the petition to deny was filed, the licensee appointed an Hispanic as Acting Music Assistant, an upper-level position. As of February 27, 1991, this position was made permanent and filled by an Hispanic. The licensee is also in the process of creating a new position, Community Affairs Producer. For that position, the licensee has indicated that it intends to contact Hispanic referral sources, send recruiters to a Job Conference, which is co-sponsored by an Hispanic organization, and put together a group of Hispanic journalists to assist the station in identifying and recruiting promising Hispanic candidates.

25. There are no substantial and material questions of fact to warrant designation for hearing. *Astroline, supra.* We find no evidence of employment discrimination. The station did contact minority sources, attract minority applicants and hire a minority for an upper-level position. Therefore, we find that renewal is in the public interest. We find that, contrary to the NHMC's argument, the EEO record in this case is less egregious than that of the station in *WROV, supra.* The licensee in this case contacted a wide variety of sources, including minority sources, for every opening, and employed minorities in upper-level positions throughout the license term. However, we are concerned regarding the licensee's efforts towards Hispanics because the licensee states that it began taking steps to improve its poor record recruiting Hispanics only after its 1990 renewal application was filed. In order to monitor the licensee's efforts in this regard and ensure that they continue, we therefore renew the license subject to reporting conditions.

## V. CONCLUSION

26. After reviewing the record before us, we find that no hearings are warranted and the renewal applications of KIFM(FM), KFMB(AM)/KFMB-FM, and KCRW(FM) should be granted. However, the renewal application of KCRW(FM) will be granted subject to reporting conditions.

## VI. ORDERING CLAUSES

27. IT IS FURTHER ORDERED that the Petitions to Deny filed by the NHMC against the renewal applications for stations KIFM(FM), KFMB(AM)/KFMB-FM, and KCRW(FM) ARE DENIED.

28. IT IS FURTHER ORDERED that the license renewal application filed by KIFM Broadcasting, L.P. for Station KIFM(FM) IS GRANTED.

29. IT IS FURTHER ORDERED that the license renewal applications filed by Midwest Television, Inc. for Stations KFMB(AM)/KFMB-FM ARE GRANTED.

30. IT IS FURTHER ORDERED that the license renewal application filed by Santa Monica Community College for Station KCRW(FM) IS GRANTED subject to reporting conditions as described herein.

31. IT IS FURTHER ORDERED that the licensee of KCRW(FM) submit to the Commission an original and one copy of the following information on August 1, 1996, and August 1, 1997:

(a) For each report, make two lists divided by full-time and part-time vacancies during the 12 months preceding the respective reporting dates, indicating the job title and FCC job category of the position, the race or national origin, sex and the referral source of each applicant for each and the race or national origin and sex of the person hired. The lists should also note which recruitment sources were contacted;[15]

(b) A list of employees as of the July 1, 1996, payroll period for the first report and as of the July 1, 1997, payroll period for the second report by job title and FCC job category indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

32. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- copies of this *Memorandum Opinion and Order* to all parties.

33. The reports are to be filed with the Acting Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch (202-632-7069).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[15] Such a list might start:

(1) News Director; Officials and Managers;

| | | |
|---|---|---|
| Full-time | | |
| 3 Applicants: | 1 White female | A.W.R.T. |
| | 1 Black male | Urban League |
| | 1 Black female | NAACP |

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP
Selected: Black male (03/15/94); Urban League

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

James M. Ward, Trustee for
Gadsden Broadcasting Company
(Transferor)

and File Nos. BTC-940808GK
BTCH-940808GL

Southeast Radio Holding Corp.
(Transferee)

For Transfer of Control of the Licenses of
WAAX(AM) and WQEN(FM),
Gadsden, Alabama

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 31, 1995; Released: August 16, 1995**

By the Commission: Commissioner Barrett concurring and issuing a separate statement.

1. The Commission has before it the above-captioned application for transfer of control of the stock of Gadsden Broadcasting Company, licensee of WAAX(AM) and WQEN(FM), Gadsden, Alabama, from James Ward, Trustee, to Southeast Radio Holding Corporation ("Southeast"). The application includes a related request for a waiver of 47 C.F.R. § 73.3555(c), the Commission's one-to-a-market rule.[1] Southeast is a subsidiary of Osborn Communications Corporation ("Osborn"). Osborn is also the parent corporation of RKZ Television, Inc., the licensee of WJSU-TV, a UHF television station and the CBS affiliate in Anniston, Alabama. The Grade A contour of WJSU-TV totally encompasses Gadsden, Alabama, the community of license of WAAX(AM) and WQEN(FM). Additionally, the 2 mV/m contour of WAAX(AM) and the 1 mV/m contour of WQEN(FM) encompasses the entire community of license of WJSU-TV. Accordingly, Southeast's acquisition of the stock of Gadsden Broadcasting Company would create a new radio-television combination that requires waiver of the one-to-a-market rule. On September 26, 1994, WNAL-TV, Inc. ("WNAL"), licensee of WNAL-TV(Ind.), a UHF television station licensed to Gadsden, Alabama, filed a petition to deny Southeast's acquisition of WAAX(AM) and WQEN(FM). The subject transfer of control is also opposed by Nina Coleman, a resident of Anniston, and Ed Carrell, President of WGAD(AM), Gadsden, Alabama. The pleadings filed by Ms. Coleman on September 26, 1994 and Mr. Carrell on Spetember 19, 1994 do not meet the procedural requirements for a formal petition to deny because neither pleading is supported by the required affidavit and because neither pleading was served on the parties to the transfer of control proposed here. 47 U.S.C. § 309(d)(1). Consequently, the pleadings filed by Ms. Coleman and Mr. Carrell will be treated as informal objections pursuant to 47 C.F.R. § 73.3587.

2. Southeast bases its waiver request on the one-to-a-market waiver standards adopted in the *Second Report and Order* in MM Docket 87-7, 4 FCC Rcd 1741 (1989) (*"Second Report and Order"*), *recon. granted in part and denied in part* (*"Second Report and Order Recon."*), 4 FCC Rcd 6489 (1989). Under these standards, the Commission will presume that waiver of the rule will serve the public interest in cases involving (1) stations serving the top 25 markets where at least 30 separately owned, operated and controlled stations will remain following the proposed combination; or (2) "failed" stations (stations that have not been operational for a substantial period of time or are involved in bankruptcy proceedings). Otherwise, the waiver request must be evaluated under the more rigorous case-by-case standard. Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented; (2) the number of media outlets owned by the applicant in the relevant market; (3) the types of facilities involved; (4) the public service benefits that will arise from the joint operation of the facilities, such as economies of scale, cost savings and programming and service benefits; and (5) the financial difficulties of the stations involved. *Second Report and Order,* 4 FCC Rcd at 1753. Because Southeast's waiver request does not meet the top 25 markets/30 voices standard or the "failed station" standard, Southeast submits a showing addressing the case-by-case factors.

3. *Competition and Diversity in the Market.* The first factor concerns the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately owned and operated broadcast "voices" in the market, and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held that, in the context of a one-to-a-market waiver, it will consider the "relevant TV metro market for radio stations and the relevant ADI [Area of Dominant Influence] TV market for TV stations." *See Second Report and Order,* 4 FCC Rcd at 1760, n.101. Southeast states that WJSU-TV is included in the Anniston, Alabama ADI which consists solely of Calhoun County. The Anniston ADI was ranked 194th in 1994 and no television metro market is defined for the one county ADI. The radio stations in the proposed combination, WAAX(AM) and WQEN(FM), licensed to Gadsden, are located in Etowah County, which joins Calhoun County to the north. Etowah County is part of the Birmingham television ADI, but is not a county included in the Birmingham television metro market. Under these circumstances, Southeast contends that the Commission should consider the relevant market to be defined by Calhoun and

[1] Section 73.3555(c) of the Commission's rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a commonly-owned television station, or, conversely, if the Grade A contour of a television station encompasses the entire community of license of a commonly-owned AM or FM station. *See* 47 C.F.R. §73.3555(c).

Etowah counties and that the number of broadcast stations in the market should be defined as radio and television stations which serve these two counties. In this regard, Southeast asserts that 37 radio stations and 16 television stations provide service to Calhoun and Etowah counties and that these 53 broadcast stations represent 44 separately owned and operated broadcast "voices." Southeast derived this information from the 1994 Arbitron County Radio Reports for Calhoun County and Etowah County and the Neilsen Station Index, County Coverage Study, 1994. Additionally, Southeast reports that both counties have cable penetration rates of at least 76 percent. Calhoun County has two daily newspapers, and two weekly newspapers, while Etowah County has one daily newspaper.

4. In its petition to deny, WNAL disputes Southeast's characterization of the market and Southeast's assertion that the proposed radio-television combination will not result in undue concentration in the market. In this regard, WNAL argues that Southeast's count of the number of radio and television stations in the market is inflated because Southeast has included stations licensed to Birmingham, Atlanta, Nashville and Huntsville that do not provide local programming or compete for advertising revenues in Anniston or Gadsden. WNAL asserts that these stations have little or no audience share in Calhoun and Etowah counties. WNAL contends that Calhoun and Etowah counties are geographically isolated by hilly terrain and that this transaction involves two separate small markets, Anniston and Gadsden. WNAL argues that this analysis is supported by the fact that Anniston and Gadsden are 26 miles apart and are assigned to separate television ADIs. WNAL asserts that Anniston and Gadsden are each served by 4 television stations and "a handful of truly local aural services."

5. *Number of Outlets Owned and Types of Facilities.* The proposed combination will result in Southeast's ownership of an AM/FM/television combination. Other than these broadcast stations, Southeast has no other media outlets in Alabama. WJSU-TV is a UHF facility authorized to operate on Channel 40 with 720 kW effective radiated power ("ERP"), from an antenna height of 880 feet ("HAAT"). WAAX(AM) is a Class B AM station, presently operating non-directionally on 570 kHz with a daytime power of 5 kW and directionally with nighttime power of 500 watts. WQEN(FM) is a Class C facility operating on 103.7 MHz at 97 kW ERP from an antenna height of 1080 feet HAAT. Southeast contends that the market shares reported for the stations in current Arbitron County Radio Reports demonstrate that WAAX(AM) and WQEN(FM) do not dominate the market and that the stations' market shares have steadily declined since 1990. In this regard, WAAX(AM)'s share has dropped 31 percent in Etowah County to a 10.3 share, and has dropped to 0 in Calhoun County. WQEN(FM)'s share has dropped 56 percent in Etowah County to an 11.5 share and 50 percent in Calhoun County to a 6.4 share.

6. WNAL, Mr. Carrell and Ms. Coleman all nonetheless argue that the radio-television combination that Southeast proposes to co-own is composed of dominant stations. Additionally, WNAL asserts that Southeast cannot rely on the fact that WJSU-TV is a UHF facility to support a finding that it is not a dominant television station, because WJSU-TV's only true competitor is also a UHF facility.

7. *Benefits of Joint Operation.* Southeast contends that the proposed common ownership of WAAX(AM), WQEN(FM) and WJSU-TV will allow the stations to combine certain personnel functions and to share professional service providers, including engineers, and attorneys, resulting in operating efficiencies. Additionally, Southeast intends to generate further cost savings by co-locating WJSU-TV's Gadsden offices with the studios for WAAX(AM) and WQEN-FM in Gadsden. This arrangement will allow the stations to share newsgathering facilities. Specifically, Southeast estimates that consolidation of staff and offices in Gadsden would result in savings of $120,200 annually. Specifically, Southeast estimates savings of $6,000 based upon combining news, weather, and sports information gathering. Southeast estimates additional annual savings of $10,000 through joint promotional activities. Southeast further maintains that the proposed consolidation of operations in Gadsden will reduce rent and utility expenses by approximately $14,000 per year. An additional $89,000 in yearly saving will come from reduced personnel expenses, which includes the use of shared professional service providers. Southeast asserts that the savings attributable to joint operation of the stations then will be used to improve the radio stations' facilities and to enhance program quality. Specifically, Southeast notes that news programming for Gadsden will be improved and that the stations will combine and expand their community service events. Additionally, Southeast notes that WAAX(AM) and WQEN(FM) have been unable to make needed capital improvements, and that some of the anticipated cost savings will be used to make these improvements.

8. WNAL asserts that the operating efficiencies outlined in Southeast's showing are minimal, and thus are no different than the efficiencies that would be achieved in any combination of commonly owned stations. Furthermore, WNAL claims that the cost savings that Southeast anticipates and the programming and facilities improvements that Southeast proposes to make with these cost savings are not substantial and could be implemented even if the radio/television combination is not approved.

9. *Financial Difficulties.* Southeast states that the radio stations at issue here have been financially compromised by declining revenues and operating cash flow. Southeast contends that WAAX(AM) and WQEN(FM) suffered substantial losses for each year from 1990 to 1994. In 1990, the stations had a net loss of $441,695. Financial statements from a former licensee were provided for the years 1990 through 1994. In 1991, net losses were $639,406. In 1992, net losses were $624,978. In 1993, net losses were $510,292, and in 1994, net losses were $710,769. The stations' fiscal year ended April 30 in those years. Gadsden Broadcasting Company acquired the stations in August, 1994, and since that time, Southeast reports that losses have continued. Southeast has submitted a statement of operations demonstrating that for the period from August 1, 1994 through December 31, 1994, the stations suffered a net loss of $33,658. For the four month period ending April 30, 1995, the net loss for the stations is $35,520. In each instance, depreciation and amortization are included in the net loss calculation. Southeast also reports that station revenues have declined for each year between 1990 and 1994, resulting in a net decrease of 33 percent between April 1990 and April 1994. Additionally, operating cash flow declined 56 percent during the same period.

10. WNAL contends that the financial information submitted by Southeast is deficient because the financial statements are incomplete or contain unexplained inconsistencies. In any event, WNAL asserts that Southeast is not entitled to rely on financial distress suffered by the stations prior to August 1994 because those losses may be

attributable to other stations held by a financially troubled former group owner. WNAL also points out that the financial information indicates that the stations have had positive net income of almost $12,000 during the nine month period in which Gadsden Broadcasting Company has been licensee.

## DISCUSSION

11. In evaluating a request for waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. WNAL asserts that Anniston and Gadsden are small markets, served by few radio and television stations, and that under these circumstances, Southeast has failed to meet its burden of demonstrating with specificity that the benefits of this combination of stations outweigh the Commission's traditional concerns about the effect of the combination on diversity and competition in the market. However, a major component of WNAL's argument is that Southeast's joint ownership of WAAX(AM), WQEN(FM) and WJSU-TV will effectively destroy its own financially compromised television station. The inquiry here is not the potential detrimental impact of Southeast's proposed radio-television combination on WNAL's individual UHF television station. Rather, we are required to balance Southeast's showing under the five factors against the Commission's continuing goals of encouraging diversity and economic competition in the relevant market as a whole. *See Second Report and Order*, 4 FCC Rcd at 1753.[2] In any event, although WNAL states that its television station has been losing money and that it will lose advertising revenues if Southeast's proposed combination of radio and television stations is approved, WNAL has not substantiated these assertions. In weighing these factors, we are not required to find that all five of the criteria are satisfied as a precondition to grant of a waiver of the rule. *Second Report and Order Recon.*, 4 FCC Rcd at 6491. We conclude that Southeast's showing in support of a waiver of the one-to-a-market rules meets the Commission's case-by-case criteria, and that a waiver in this instance is consistent with the public interest and would not have an adverse effect on diversity and competition in the relevant market.

12. *Competition and Diversity in the Market.* Southeast and WNAL present conflicting assessments of the level of diversity and competition in the market in light of the fact that the relevant television ADI encompasses only Calhoun County and no television metro market is defined. However, we reject WNAL's assertion that this transaction should be evaluated as two separate small markets. Consistent with the requirements of the case-by-case standard, we will include in the market television stations licensed to the Anniston ADI TV market. *See Second Report and Order*, 4 FCC Rcd at 1760 n.101. However, we will also include in the market television stations that place a Grade B signal over both Calhoun and Etowah counties, where the stations in the proposed radio-television combination are licensed. This method for counting the number of television stations in the relevant market is appropriate because the Anniston ADI excludes Etowah County, where Gadsden is located. *Cf. Glendive Broadcasting Corp. (KDZN(FM))*, 10 FCC Rcd 2708, 2711 (1995); *Duane J. Polich*, 4 FCC Rcd 5596, 5597 (1989). Additionally, Arbitron does not define a television metro market for the Anniston ADI, nor does it define a metro radio market. Nevertheless, we find that it would be consistent with Commission precedent to include in the relevant radio market those radio stations serving Calhoun and Etowah counties. *See, e.g., United Radio Group, Inc.*, 7 FCC Rcd at 2208 (number of radio stations determined by using two county radio metro market, where AM and television station licensed, plus the home county of the FM station, which was outside the radio metro market). *See also, Duane J. Polich*, 4 FCC Rcd at 5597.

13. There is only one television station, Southeast's WJSU-TV, licensed to the one county Anniston television ADI. Of the other 15 television stations listed by Southeast, WNAL-TV and WTJP-TV are licensed to Gadsden in Etowah County and place a Grade B signal over both Etowah and Calhoun counties. An additional four stations, WBRC-TV, WBMG-TV, WVTM-TV, and WTTO-TV also place Grade B signal over Etowah and Calhoun counties.[3] Thus, the market includes seven television stations. In this regard, WNAL concedes that WBRC-TV and WVTM-TV have significant audiences in Calhoun and Etowah counties and that WNAL-TV should also be included in the market in addition to WJSU-TV. Moreover, there are 14 radio stations, 8 AM and 6 FM, that are licensed in Etowah and Calhoun counties.[4] We note that Southeast's showing failed to include WSGN-FM, an operating non-commercial station licensed to Gadsden. Thus, there are a total of at least 21 broadcast stations (seven television stations and 14 radio stations) in the market that will be separately owned and operated by 18 licensees following consummation of the transaction proposed here.[5] Additionally, we note that the

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[2] Ms. Coleman and WNAL point out that the Commission previously denied a newspaper/broadcast combination in Anniston. However, WNAL and Ms. Coleman have not demonstrated how that decision is applicable to the facts presented here or our decision under the case-by-case standard for broadcast one-to-a-market waivers.

[3] Television and Cable Factbook, Stations Volume, No. 63 (1995 Edition).

[4] Where there is no television metro market, we find that it is appropriate to count as market stations those radio stations licensed to the counties where the radio stations at issue in the combination are licensed and those radio stations that place a principal community service contour over the counties where the radio stations at issue in the combination are licensed. Although Southeast asserts that there are additional radio stations licensed to communities outside Etowah and Calhoun counties that serve these two counties, Southeast has not made a showing as to whether these out of county stations place a principal community contour signal over Etowah or Calhoun counties. Nevertheless, it is likely that there are other radio stations, in addition to the 14 counted here, that provide principal community contour coverage to Etowah and Calhoun counties.

[5] Following consummation of this transaction, the market will include one AM/FM/TV combination, one AM/FM combination, 10 other separately owned radio stations and 6 separately owned television stations for a total of 18 "voices".

market includes other non-broadcast media voices, including 3 daily newspapers and a cable penetration rate of at least 76 percent.

14. *Number of Outlets Owned and Types of Facilities.* Other than the stations at issue here, Southeast owns no other media outlets in the market. Furthermore, contrary to WNAL's assertion, WSJU-TV, a UHF facility, faces competition from VHF stations WBRC-TV and WVTM-TV. Although the radio stations in the proposed radio-television combination are not insubstantial, given that WQEN(FM) is a Class C facility and WAAX(AM) is Class B AM station, as the level of competition and diversity in a market increases, the concern with this aspect of the proposed combination decreases. *See Salt of the Earth Broadcasting, Ltd.*, 9 FCC Rcd 3621 (1994). Furthermore, according to 1994 Arbitron County Radio Reports, WAAX(AM) has no audience share in Calhoun County, and along with other stations receiving zero audience share, is the lowest ranked station in the county. WQEN(FM) is ranked fifth in Calhoun County with a share of 6.4 percent, and another FM station, WHMA(FM), dominates the county with a 33 share. WAAX(AM) and WQEN(FM) have larger market shares in Etowah County, where WQEN(FM) ranks second with an 11.5 share, and WAAX(AM) ranks third with a 10.3 share. In light of the number of voices in the market, however, the stations at issue here are not dominant in the market. *See, e.g., Scripps-Howard Broadcasting Co.*, 8 FCC Rcd 8012, 8013 (1993).[6]

15. *Benefits of Joint Operation.* Southeast demonstrates that the common ownership of WAAX(AM), WQEN(FM) and WJSU(TV) will create efficiencies resulting in significant cost savings and the potential for enhanced programming and service benefits. We disagree with WNAL's assertion that these cost savings are insubstantial and that the efficiencies outlined by Southeast are no different than the efficiencies associated with operating commonly owned stations that serve the same market. There is no particular level of cost savings that must be achieved in order for a waiver to be granted under the case-by-case standard. Southeast's estimated cost savings of $120,200 annually based upon joint operation of the stations is consistent with the level of savings found to be substantial in other one-to-a-market waiver cases. *See, e.g., Salt of the Earth Broadcasting, Ltd.*, 9 FCC Rcd at 3621; *United Radio Group, Inc.*, 7 FCC Rcd 2207 (1992); *Duane J. Polich*, 4 FCC Rcd at 5596. Additionally, Southeast proposes to combine the radio stations' studios with the office facilities of WJSU-TV, to combine personnel functions and to share professional services, which are precisely the kind of operating efficiencies enumerated in the *Second Report and Order*. 4 FCC Rcd at 1746-47. Southeast has also related these cost savings to explicit service advantages in the operation of the stations, including plans for repairing and upgrading the radio stations' facilities, improving news programming and expanding community service events.[7]

16. Athough WNAL cites *Kargo Broadcasting, Inc.*, in support of its assertion that the potential benefits of joint operation of these stations are reduced because of the distance between the stations, the same magnitude of distance between the transmission facilities of the radio stations and the television station is not presented here. In *Kargo*, the distances between transmission facilities ranged from 37.5 and 47.2 miles, while in this case the facilities are 26 miles apart. 5 FCC Rcd 3442, 3443 (1992). More importantly, *Kargo* involved a combination that would have represented common ownership of the most powerful and dominant market stations by a licensee who already owned a substantial number of dominant media outlets in the market, including a newspaper. As set forth above, the types of facilities in the proposed combination and the number of media outlets already owned by Southeast do not rise to the same level in terms of power and competitive position.

17. *Financial Difficulties.* The record here demonstrates that the radio stations at issue here suffered substantial losses between 1990 and April, 30, 1994, before Gadsden Broadcasting Company, the assignee here, acquired the stations. WNAL challenges these losses, which range from $441,695 in 1990 to $710,769 in the year ending April 30, 1994. In this regard, WNAL notes that before Gadsden Broadcasting Company acquired the stations in August of 1994, WAAX(AM) and WQEN(FM) were licensed to a subsidiary of a group owner. However, WNAL's assertion that financial difficulties at the group owner's other stations probably account for these losses is unsubstantiated, and thus speculative. Nevertheless, we acknowledge that the radio stations' financial situation has improved during the nine month period after they were acquired by Gadsden Broadcasting Company. Also, as WNAL points out, there is no showing that the stations were offered for sale, and that no other buyer came forward. *See Second Report and Order*, 4 FCC Rcd at 1753, n.103. Although the financial showing submitted by Southeast does not indicate that the stations are in financial distress under their present ownership or are likely to go off the air, such a showing is not required. *See Second Report and Order Recon.*, 4 FCC Rcd at 6491 ("Not all of the factors mentioned will be relevant in every case."). Furthermore, given that the market will be served by at least 21 broadcast stations, representing 18 separately owned and operated broadcast "voices" following the combination proposed by Southeast, we disagree with WNAL's assertion that this transaction involves a smaller market, with limited competition, such that demonstrated financial difficulties are of greater importance. *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. One-to-a-market waivers have been granted where there was no evidence presented concerning financial difficulties, and, in one instance, the relevant market was served by 14 "voices." *See Perry Television*, 5 FCC Rcd 1667, 1671 (Rev. Bd. 1990). Indeed, the Commission has expressly recognized that an appropriate showing on *all* the five factors is not required as a pre-condition to a case-by-case waiver of the one-to-a-market rule. *See Second Report and Order Recon.*, 4 FCC Rcd at 6491.

18. *Conclusion.* On balance, we find that the proposed combination does not present issues of market concentration inconsistent with the public interest given the competitive environment in the market, both in terms of number of other broadcast stations and the relevant market shares of the stations involved in this transaction. WNAL

[6] Ms. Coleman and Mr. Carrell assert that Southeast's proposed combination will dominate or monopolize advertising revenues in the market, but these claims are unsubstantiated and thus are speculative.

[7] Mr. Carrell acknowledges that the efficiencies resulting from the combined operation of these stations will lead to significant cost savings and programming improvements.

raises no substantial and material question of fact under the case-by-case waiver standard that would warrant further inquiry. The market at issue is well-served by broadcast and non-broadcast media. In view of the number of broadcast voices that will remain in the market after this transaction is consummated and the number and nature of Southeast's proposed combination of facilities, we are persuaded that there will not be any significant reduction in diversity and competition resulting from grant of a waiver in this case and that significant public interest benefits, including substantial combinational efficiencies and significant program service benefits, will result.

19. Accordingly, IT IS ORDERED, That the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(c), IS HEREBY GRANTED, and, having found the parties thereto otherwise qualified, the application for a transfer control of the licenses of WAAX(AM), Gadsden, Alabama and WQEN(FM), Gadsden, Alabama, File Nos. BTC-9440808GK, BTCH-940808GL, from James M. Ward, Trustee for Gadsden Broadcasting Company, to Southeast Radio Holding Corporation IS HEREBY GRANTED. IT IS FURTHER ORDERED That the Peition to Deny the application, filed September 26, 1994 by WNAL, Inc. IS HEREBY DENIED. The letter pleadings filed on September 26, 1994 by Nina Coleman and on September 19, 1994 by Ed Carrell, when treated as informal objections pursuant to 47 C.F.R. § 73.3587 ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 90-430**

In re Applications of

| | |
|---|---|
| MARIA M. OCHOA | File No. BPH-890615ME |
| FOOTHILLS BROADCASTING, INC. | File No. BPH-890616MR |

For Construction Permit
For A New FM Station on
Channel 277A, Lenoir,
North Carolina

**ORDER**

**Adopted: August 4, 1995; Released: August 16, 1995**

By the Commission:

1. Before the Commission for consideration is the Review Board's Decision in this proceeding, 10 FCC Rcd 4323 (Rev. Bd. 1995), an Application for Review filed April 27, 1995 by Maria M. Ochoa, and an Opposition filed May 12, 1995 by Foothills Broadcasting, Inc. Having carefully considered the matters of record herein, we agree with the Board's disposition of this case and affirm its Decision.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Application for Review filed April 27, 1995 by Maria M. Ochoa IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Greater Media Cable CUID No. MA0087 (Chicopee)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 8, 1995; Released: August 16, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was completed and served on Operator on January 26, 1994 and received by the Commission on February 2, 1994. Operator filed FCC Form 393 in response; Operator also filed an amended Form 393 filing on June 24, 1994.[11]

5. In its amended benchmark filing of June 24, 1994, Operator calculated a maximum permitted price for its CPS tier of $10.03 per month (plus franchise fee). We have found no apparent errors in Operator's calculation of its maximum permitted rate. However, Operator's actual price for the CPS tier was $10.56 per month (plus franchise fee). Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable and we must therefore recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operator filed.[12] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993, the base date Operator used in justifying its rate.

6. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $9.96 per month (plus franchise fee) for the period from February 2, 1994 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("Second Order on Reconsideration"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. See para. 3, infra. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. See 47 C.F.R. § (76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] See 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[13] This finding is based solely on the representations of Oper-

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from February 2, 1994[14] to May 14, 1994 which exceeded the maximum price of $9.96 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $9.96 (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

ator and the modification described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| Greater Media Cable | CUID Nos. MA0018 (Worcester) |
| | MA0107 (Easthampton) |
| | MA0209 (Sturbridge) |
| Benchmark Filings to Support | MA0260 (Boylston) |
| Cable Programming | MA0319 (West Boylston) |
| Service Prices | |

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 8, 1995; Released: August 16, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992, and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator on January 26, 1994 and received by the Commission on February 2, 1994. Operator filed FCC Form 393 in response; Operator also filed amended Form 393 filings on June 24, 1994.[10]

5. Operator's actual CPS tier prices were above the maximum permitted prices that Operator calculated for the CPS tier and, thus, Operator failed to demonstrate that its prices for the CPS tier were not unreasonable. Furthermore, upon review of Operator's submissions for the franchise areas, we have found that Operator has miscalculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in its Form 393:

a. In Part III, Schedule B, Operator did not account for any real estate taxes or utilities expenses. In response to a request for further information, Operator provided information as to the proper allocation of these expenses.[11] These costs were included in the calculation of Schedule B costs.

b. Because Operator has failed to demonstrate that its prices for the CPS tiers were not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operator filed.[12] On its amended Form 393s, (using data released on August 31, 1993),

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("Second Order on Reconsideration"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. See para. 3, infra. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. See 47 C.F.R. § 76.922(b)(4)(C).

[2] 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956(b).

[4] *Id.*

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] 47 C.F.R. § 76.922(b).

[7] *See Second Order on Reconsideration,* 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.*

[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration,* 9 FCC Rcd at 4189 n.195.

[10] Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[11] On January 25, 1995, information was requested by telephone. *See also,* Letter from Andra Cunningham of the FCC to Steven Horvitz of Cole Raywid & Braverman, counsel to Greater Media Cable (January 27, 1995).

[12] *See* 47 C.F.R. §76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

Operator calculated the Inflation Adjustment Factor as of the end of October 1993 for CUID Nos. MA0018, MA0107, MA0209, and MA0260, and as of the end of November 1993 for CUID No. MA0319. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993 and 1.032 through November 1993, the base dates Operator used in justifying its rates for the franchise areas under consideration in this Order.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the period in question. Operator's showings justify the maximum reasonable CPS tier prices shown on the Appendix (plus franchise fee) for the period from February 2, 1994 to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service prices charged by Operator in the franchise areas referenced in the caption ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise areas referenced in the caption that portion of the amounts paid for cable programming service for the period from February 2, 1994[14] to May 14, 1994 which exceeded the maximum price for each franchise area (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the franchise areas listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix A (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| MA0018 | $11.75 | $11.49 |
| MA0107 | $10.71 | $ 9.45 |
| MA0209 | $11.52 | $11.20 |
| MA0260 | $12.24 | $11.13 |
| MA0319 | $12.00 | $11.68 |

[13] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Jones Intercable, Inc. CUID No. IL0094 (Aurora)

Benchmark Filing to Support
Cable Programming Service Price

## MEMORANDUM OPINION AND ORDER

**Adopted: July 13, 1995; Released: August 16, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was served on Operator and received by the Commission on February 28, 1994. Operator filed an FCC Form 393 in response on May 17, 1994.

5. Operator asserts that its monthly CPS tier price of $10.01 (plus franchise fee) is justified by its benchmark filing because its price is equal to or lower than the maximum permitted charge as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a subchapter "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[11] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("Second Order on Reconsideration"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. See para. 3, infra. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. See 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), as amended, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration,* 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration,* 9 FCC Rcd at 4189 n.195.

[11] First Order on Reconsideration, Second Report and Order, and third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax-paying business entities to the extent that they have a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

recalculated Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[12] However, Operator's entries on these two lines were different. We therefore adjusted Line 104 to equal the amount entered on Line 34.

c. Because of these errors, we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[13] On its Form 393, Operator calculated the Inflation Adjustment Factor as of the end of February 1994 using data released by the U.S. Department of Commerce on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through February 1994, the base date Operator used in justifying its rates, of 1.039.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier price of $9.95 per month (plus franchise fee) for the period from February 28, 1994 to May 14, 1994.[14] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $9.95 (plus franchise fee).[15]

9. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[12] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Jones Intercable, Inc. CUID Nos. MI0204 (Dowagiac)
MI0243 (Watervliet)

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 17, 1995; Released: August 16, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward. [8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on June 6, 1994.[11]

5. Operator asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are equal to or lower than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a subchapter "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax-paying business entities to the extent that they have a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

return on equipment and installations and thereby could increase its CPS price. We therefore recalculated Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[13] However, Operator's entries on these two lines were different. We therefore adjusted Line 104 to equal the amount entered on Line 34, which includes the correctly grossed-up tax entries.

c. Because of these errors, we conclude that Operator has failed to demonstrate that its prices for the CPS tier were not unreasonable. We will, therefore, set prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, using the most accurate data currently available for the date which Operator filed.[14] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993, the base date Operator used in justifying its rates.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[15]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the franchise areas referenced in the caption and at Appendix A ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise areas shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[16] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the franchise areas listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[17]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

### Appendix A

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| MI0204 | 10/12/93 | 10/15/93 |
| MI0243 | 12/03/93 | 11/29/93 |

### Appendix B

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| MI0204 | $10.97 | $10.79 |
| MI0243 | $10.24 | $10.08 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Falcon Holding Group, Inc. CUID No. NC0569 (Morganton)

Benchmark Filing To Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 17, 1995; Released: August 16, 1995**

By the Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider a complaint about the price Falcon Holding Group, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in Morganton, North Carolina, CUID No. NC0569. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

## PROCEDURAL MATTERS

4. A complete and timely CPS complaint was served on Operator on November 22, 1993.[11] It was received by the Commission on November 29, 1993. Operator did not file an FCC Form 393 until June 24, 1994.[12]

5. Operator states that it restructured its service offerings on September 1, 1993. In addition to its basic tier, Operator began offering eight channels on an individual, or a la carte, basis. These a la carte channels could also be purchased collectively as one eight-channel package. A similar type of restructuring was addressed in our letter of inquiry ("LOI") order released on December 2, 1994, in which we resolved the regulatory status of the ten-channel a la carte package offered by Operator to its subscribers in Southern Shores, North Carolina.[13] In the LOI order, we found that the retiering in Southern Shores constituted an evasion of rate regulation. In addition, we found an evasion of rate regulation in the case of another cable operator who retiered its service offerings on September 1, 1993 to create an eight-channel a la carte package from what would have been regulated channels.[14] In both cases, we concluded that the operator's a la carte package must be treated as a rate-regulated cable programming service tier and that the

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was signed November 22, 1993 and states that it was mailed to Operator on that date. Operator has not complied with 47 C.F.R. § 76.956(a), which requires a cable operator to state when service occurred. Under these circumstances, we will consider November 22, 1993 as the service date.

[12] Operator did not comply with § 76.956(a) of the Commission's Rules, 47 C.F.R. § 76.956(a), which required it to file FCC Form 393 with the Commission within 30 days of being served with a valid CPS complaint.

[13] *See* Falcon Cable TV, Southern Shores, North Carolina, LOI-94-2, DA 94-1551, (Cab. Serv. Bur., released Dec. 2, 1994).

[14] *See* Vision Cable of North Carolina, Inc., City of Charlotte and Mecklenburg County, North Carolina, LOI 93-24, DA 94-1552 (Cab. Serv. Bur., released Dec. 22, 1994).

channels composing it must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms. Likewise, Operator's eight-channel a la carte package in Morganton must also be treated as a rate-regulated cable programming service tier.

## DISCUSSION

6. In its June 24, 1994 filing, Operator did not attempt to justify its monthly price of $9.95 for its a la carte package because Operator failed to classify this eight-channel a la carte package as a CPS tier. Upon review, we also determined that Operator miscalculated its maximum permitted per-channel rate, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Operator's calculations for its regulated rates as of the initial date of regulation (Form 393, Part II, Worksheet 1) reflect a rate of $15.99 for the basic tier and $1.00 for the CPS tier. However, these rates were not in effect on the initial date of regulation. The rates effective on the initial date of regulation were those in effect on September 1, 1993, which were set forth in the rate card provided by Operator along with its June 24, 1994 filing. We have therefore changed Part II, Worksheet 1, Line 101, to $16.99 for the basic tier and $9.95 for the CPS tier.

b. Operator's calculations for its regulated rates as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) reflect 27 regulated channels and 16 satellite channels. These channel counts do not include the eight a la carte channels that were offered as a package. Consistent with our decision to classify the eight-channel a la carte package as a CPS tier, we increased the number of regulated channels to 35 channels and the number of satellite channels to 24 channels.

c. In Column G of Schedules A and C of Part III of its Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a subchapter "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[15] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS prices. We therefore recalculated Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

d. Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[16] However, Operator's entries on these two lines differed substantially. We therefore adjusted Line 104 to equal the amount entered on Line 34, which includes the adjustment made when using correctly grossed-up tax entries.

e. Because of these errors, we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1 on the basis of the most accurate data currently available for the date Operator was required to file Form 393.[17] On its Form 393, Operator calculated the Inflation Adjustment Factor as of the end of November 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.032 through November 1993, the base date Operator used in justifying its rate.

## CONCLUSIONS

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator's showing justifies a maximum reasonable CPS tier price of $5.12 per month (plus franchise fee) for the period starting on November 29, 1993 to May 14, 1994.[18]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the November 22, 1993 complaint against the cable programming service price charged by Operator in CUID No. NC0569 IS GRANTED TO THE EXTENT INDICATED HEREIN.

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[15] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax-paying business entities to the extent that they have a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

[16] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[18] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation, or argument made by any party to this proceeding not specifically addressed herein.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in CUID No. NC0569 that portion of the amount paid for cable programming service from November 29, 1993[19] to May 14, 1994 that exceeded the maximum price of $5.12 per month (plus franchise fee), plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing for CUID No. NC0569 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 (Line A6b) to equal the maximum price of $5.12 (plus franchise fee).[20]

12. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

[20] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Brazos Broadcasting Company CSR-4039-A
Bryan, Texas

For Modification of the Waco-Temple-
Bryan, Texas ADI

## MEMORANDUM OPINION AND ORDER

**Adopted: August 3, 1995; Released: August 16, 1995**

By the Deputy Chief, Cable Services Bureau:

## INTRODUCTION

1. Brazos Broadcasting Company, licensee of station KBTX-TV (CBS, Ch. 3), Bryan, Texas, has filed a petition for special relief seeking to include various communities located in Grimes, Walker and Washington Counties, Texas,[1] in the Waco-Temple-Bryan, Texas ADI for purposes of the Commission's cable television mandatory signal carriage rules. An opposition to this petition was filed on behalf of KHOU-TV, Inc., licensee of Station KHOU-TV (CBS, Ch. 11), Houston, Texas to which KBTX-TV has replied.

## BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 4 provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from suchstation's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

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[1] Page 1 of KBTX-TV's petition asks for the inclusion of the three counties, but in paragraph 26, page 10 of the same petition, KBTX-TV specifically lists the cable system communities which would be affected by the waiver request: Navasota and Brenham, Texas (served by Northland Cable) and Huntsville, Texas (served by Tele-Cable, Inc.) In a June 19, 1995 supplement KBTX-TV revised its request to specifically request the inclusion of these communities instead of the counties and, at the same time, indicated that each system also served certain surrounding unincorporated areas (i.e. the unincorporated areas of Grimes County surrounding Navasota, the unincorporated areas of Walker County surrounding Huntsville, and the unincorporated areas of Washington County surrounding Brenham). We note that an opposition to this supplement was filed by KHOU-TV objecting to its acceptance as a late-filed move to switch the focus of the petition's request. However, in light of the fact that KBTX-TV's original petition essentially provided the same information, we will treat KBTX-TV's supplement as a clarification of earlier submitted information.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in § 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated § 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] 47 U.S.C. §534(h)(1)(C)(ii).

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in *MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (e.g., rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

## MODIFICATION ARGUMENTS

8. The communities here in question are located in the counties of Grimes, Walker and Washington, Texas and are considered to be part of the Houston, Texas area of dominant influence ("ADI"). Bryan, Texas, KBTX-TV's city of license, is considered to be part of the Waco-Temple-Bryan, Texas ADI. KBTX-TV's transmitter is located within Grimes County and its Grade A contour encompasses all of the communities.

9. In support of its petition, KBTX-TV states it has been carried on the cable systems serving the various communities since the systems' inception[12] and that it is considered to be significantly viewed in Grimes, Walker and Washington counties. KBTX-TV submits total weekly viewing statistics from 1990 through 1992[13] for the three counties which indicates that KBTX-TV's viewership ranges from 26% to 47% for Grimes County, 20% to 25% for Walker County and 6% to 10% for Washington County. It contrasts this to the viewership levels attained for the same periods by KHOU-TV, the Houston ADI CBS station for 2 of the counties: 8% to 15% for Grimes County, and 10% to 11% for Walker County. Only in Washington County, states KBTX-TV, is KHOU-TV ranked higher in viewership levels than KBTX-TV, but it still ranks fourth for the

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7 H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
8 *Id.* at 2977 (emphasis in original).
9 *MM Docket 92-259,* 8 FCC Rcd at 2977, 2977 n.139.
10 47 C.F.R. § 76.59.
11 *MM Docket 92-259,* 8 FCC Rcd at 2981.
12 KBTX-TV states that the Navasota, Texas system began operation on June 1, 1967; the Brenham, Texas system on September 1, 1971; and the Huntsville, Texas system on August 9, 1962.
13 KBTX-TV submits the following Arbitron ratings data: 1990 County/Coverage Study, County Summary, 1991 County/Coverage Study, County Summary, and 1991-92 County/Coverage Study, County Summary.

county overall. KBTX-TV indicates that it provides a large amount of local programming for the counties,[14] provides an outlet for local advertisers who are priced out of the Houston market, and is the main source for weather service in the area. KBTX-TV stresses that this last is especially important in light of the potential for severe weather conditions experienced in the counties. Lastly, KBTX-TV argues that the three affected cable systems in the counties have all expressed the wish to continue to carry KBTX-TV as a local station.

10. KHOU-TV's opposition argues that grant of KBTX-TV's request could adversely affect its carriage rights within its home ADI and substantially disrupt cable viewers' service. It therefore requests that KBTX-TV's petition be denied for the following reasons: 1) KBTX-TV requests the inclusion of three Texas counties, rather than specific communities within those counties. KHOU-TV states that neither the 1992 Cable Act nor the Commission's rules allows for the inclusion of whole counties. Moreover, it maintains, KBTX-TV has failed to provide community-specific survey data, but relies instead on county-wide viewership data to support its request. 2) KHOU-TV avers that the county-specific local programming enumerated by KBTX-TV as being provided to the three counties is meager in proportion to the total amount of programming the station airs. It points out for example that, on average, for 1993 KBTX-TV provided for the 3 subject counties approximately one local community guest appearance on magazine programs every two months, three news stories per month for the first eight months, less than two sporting events or sports-related stories per month. It states that for previous years KBTX-TV's local programming has been equally meager for all three counties. 3) KHOU-TV argues that KBTX-TV has provided no information to indicate the subject counties are not sufficiently provided local programming by their own market ADI stations. Indeed, KHOU-TV maintains that it regularly covers news and events in the three counties and airs extensive weather coverage of the area by top meteorologists.[15] 4) The viewing statistics provided by KBTX-TV focus on total week viewing instead of the more specific daypart statistics for local news and other non-network programming. KHOU-TV states that Nielsen's 1993 County/Coverage Study County Summaries demonstrate that its station, and the other Houston stations, have very strong viewer support for their evening news program.[16] 5) KBTX-TV fails to substantiate its claims of historic carriage by providing documents listing the channel line-up of the cable systems for a period of years. Even if its claim is true, however, KHOU-TV states that all of the Houston ADI stations have also been historically carried on these cable systems. 6) The fact that KBTX-TV may have advertisers located within the subject counties is irrelevant. In any event, the must carry rules are designed to increase viewers' access to local programming, not expand a station's advertising audience.

11. KBTX-TV's reply states that its petition makes clear which communities and which cable systems are affected by its waiver request. Further, it maintains that KHOU-TV has provided no support of its allegations that KBTX-TV is providing only "token" local programming. While KBTX-TV concedes that KHOU-TV may well provide more than adequate coverage in its market, such coverage is irrelevant to the issue of whether the affected communities should also be included within KBTX-TV's market. KBTX-TV contends that since it is the closest commercial station to these cable systems and its transmitter is located within one of the counties involved, it would be absurd for it to have no mandatory carriage rights in the areas. Moreover, it continues, when comparing the aggregate viewing of all of the Houston stations against that of KBTX-TV, it is not surprising the Houston stations would exceed KBTX-TV. Finally, KBTX-TV states that its historic carriage on the cable systems was verified by a declaration of Jim Baronet, General Manager of KBTX-TV. It argues that KHOU-TV cites no facts to contradict this declaration. Indeed, KBTX-TV maintains that the issue of its carriage is bolstered by the fact that it has been a significantly viewed signal in all three counties since 1972 and was considered a must carry signal on the systems under former §76.59(a)(1) of the Commission's Rules. KBTX-TV states in conclusion that grant of its request would not mean the end of KHOU-TV's rights in its market, but instead merely enable KBTX-TV to assert must carry rights under the new rules as it was able to do under the former rules.

## DISCUSSION

12. We shall grant KBTX-TV's request to include the communities of Navasota, Brenham, Huntsville, Texas and their respective surrounding unincorporated county areas within the Waco-Temple-Bryan, Texas ADI for must carry purposes. Initially, we note that KBTX-TV has demonstrated a long history of carriage on the cable systems serving the above communities since these systems first began operation. Secondly, KTBX-TV has also shown that it provides coverage of and service to these communities and that they are all encompassed by its Grade A contour. In fact, the stations transmitter is actually located in Grimes County. We have stated previously that this, alone, is sufficient to satisfy the local coverage and service factor.[17] Third, KBTX-TV's showing with regard to local programming augments this finding. The petitioner acknowledges, and our own review confirms, that KHOU-TV in the Houston ADI also covers local events in the subject communities. However, we do not believe that Congress intended for the third criterion to operate as a bar to a

[14] KBTX-TV provides exhibits of programming for all three counties: a listing of local county officials appearing on KBTX-TV's morning and noon magazine programs, lists of special projects, news and sports coverage, testimonials from county community leaders and residents, and lists of advertisers on KBTX-TV who operate in the counties.

[15] KHOU-TV states that it operates a transportable Ku band satellite uplink news truck for immediate on-the-spot news coverage in its area, including the subject counties; operates 4 live remote pickup microwave vans, 22 photographer trucks, and a news helicopter with a 300-mile radius. In addition it programs 3 full hours of local news per weekday and one hour of local news per weekend day.

[16] The statistics provided by KHOU-TV indicate that for the 10-10:30 p.m. newscasts, KHOU-TV achieves a 32% share in Washington County, a 16% share in Walker County and a 19% share for Grimes County in comparison to KBTX-TV's shares of 12%, 11% and 37%, respectively.

[17] 8 FCC Rcd at 2977. *See* paragraph 5, *supra*.

station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Finally, with regard to viewing patterns, the most recent Arbitron county coverage reports of 1993-94 confirm KBTX-TV's assertion that it achieves substantial viewership. According to Arbitron, the station receives a total viewing share of 27% and a net weekly circulation of 89% in Grimes County, 20% and 68% in Walker County, and 7% and 49% in Washington County. We also recognize that this data is county data, rather than community-specific data, but we shall accept it as probative (although not conclusive) in cases of this type, absent evidence that it is not fairly reflective of viewing in the actual communities in question.

## ORDER

13. Accordingly, IT IS ORDERED, pursuant to §614(h)(1)(C) of the Communications Act of 1934, as amended (47 U.S.C. §534(h)(1)(C)) and §76.59 of the Commission's Rules (47 CFR §76.59), that the petition for special relief, filed by Brazos Broadcasting Company, IS GRANTED. KBTX-TV shall notify the relevant cable systems in writing of its carriage and channel position elections (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this Order. The affected cable systems shall come into compliance with the applicable rules within sixty (60) days of such notification.

14. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Son Broadcasting, Inc. against Post-Newsweek Cable, Inc. CSR-4462-M

Request for Carriage

## MEMORANDUM OPINION AND ORDER

**Adopted: August 3, 1995; Released: August 16, 1995**

By the Deputy Chief, Cable Services Bureau:

## INTRODUCTION

1. On February 7, 1995, Son Broadcasting, Inc. ("Son"), licensee of Television Broadcast Station KCHF (Ind., Channel 11) Santa Fe, New Mexico ("KCHF"), filed a complaint against Post-Newsweek Cable, Inc. ("PNC") for the latter's failure to comply with the Commission's must-carry rules and the 1992 Cable Act. Due to ongoing negotiations between the parties, PNC petitioned the Bureau for extensions of time to and including June 19, 1995 within which to respond to Son's Complaint.[1] As the parties were unable to reach an amicable resolution, PNC responded to Son's complaint on June 19, 1995. Son replied to PNC's response on July 24, 1995.

2. PNC operates a cable system serving Rio Rancho, New Mexico, which is located within the Albuquerque, New Mexico area of dominant influence ("ADI"). KCHF is licensed to Santa Fe, New Mexico, which is located within the Albuquerque ADI as well. It is undisputed that KCHF provides a good quality signal at PNC's headend as required by §76.55(c)(3) of the Commission's Rules.

## SUMMARY OF PLEADINGS

3. In its complaint, Son maintains that on December 6, 1994, it requested carriage of KCHF on PNC's Rio Rancho system, noting that the only prior impediment to carriage of KCHF had been the need to reimburse PNC of any excess incremental copyright fees. Son advised PNC that copyright liability was no longer an impediment since the enactment of the Satellite Home Viewer Act of 1994 ("the Home Viewer Act").[2] Specifically, Son stated that, as a result of the Home Viewer Act, copyright royalty fees were no longer required for carriage of any station on a cable system located within the station's ADI; therefore, KCHF was entitled to carriage. According to Son, however, PNC found the Home Viewer Act to be ambiguous and declined to carry KCHF, unless KCHF agreed to escrow an amount equal to the estimated copyright fees for one period totalling $35,000. Son states that PNC claims that this is the amount it would incur as a result of carriage of KCHF's signal and as a result of reporting such carriage to the Copyright Office as a "distant" signal.

4. Next, Son states that on December 20, 1994, it renewed its request for carriage on PNC's Rio Rancho system and illustrated that the intent of the Home Viewer Act is to remedy the anomaly requiring some must-carry stations to pay copyright royalty fees while others did not. Son states that Congress explained that "this anomaly places the newer stations at a competitive disadvantage and in some cases has resulted in cable systems refusing to carry the newer stations, diminishing the amount of programming available to the public."[3] Son further argues that PNC's interpretation of the Home Viewer Act seems crafted as a deterrent to any station seeking carriage, because although §76.55(c)(2) of the Commission's Rules provides that stations must agree to indemnify in the case of potential copyright liability, KCHF is being asked to escrow over $35,000 where there is *no* possibility of copyright liability. Son adds that PNC's preconditions to carriage on its system is, for all practical purposes, an outright denial of carriage. Moreover, Son states that PNC's claims that it will report carriage of KCHF as a distant signal is a proposal which flies in the face of the Home Viewer Act.

5. PNC argues that the "anomaly" to which Son refers never existed in law or fact because the Copyright Act of 1976 establishes a clear mechanism for granting local signal status to the signals of television stations which commenced operations after 1976. PNC further claims that §3(b) of the Home Viewer Act *seems* to amend §111(f) of the Copyright Act so as to essentially make local any station within the same television market as the cable system. However, PNC contends that §5 of the Home Viewer Act provides that "the amendments made by this section apply only to section 119 of title 17 of the United States Code." PNC states that §119 of title 17 is the pre-existing version of the Home Viewer Act which deals with compulsory copyright performance licensing for television signals delivered via satellite receive-only earth stations. Thus, PNC argues that given the language of §5 of the Home Viewer Act, §3 of the Act may not be applied broadly to cable television retransmissions of broadcast signals. PNC claims that the legislative history on the subject is inconclusive, which renders the Home Viewer Act, at best, ambiguous as it relates to the scope of §3.

6. PNC adds that it has at all times acted reasonably and in a spirit of accommodation in attempting to amicably resolve the dispute, and that its request for indemnification for any increased copyright liability is fully consistent with the Communications Act of 1934, as amended, and the Commission's Rules. PNC states that, in light of the am-

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[1] Extension requests were filed on March 7, 1995; March 13, 1995; April 3, 1995; April 7, 1995; April 24, 1995; May 8, 1995; May 22, 1995; and June 6, 1995. In each request, PNC stated that the parties were in the midst of settlement discussions and were contemplating the withdrawal by Son of its Complaint. On June 16, 1995, Son filed an opposition to PNC's June 6, 1995 petition for extension of time. However, in light of the fact that PNC responded to Son's must-carry complaint on June 19, 1995, Son's opposition is moot. On July 6, 1995 and July 19, 1995, Son requested additional time to and including July 26, 1995 within which to reply to PNC's opposition. In view of the ongoing nature of the negotiations between the parties and the mutual requests made for extensions of time, we will grant the requested relief.

[2] P.L. 103-369, 108 Stat. 3477 (1994).

[3] H.R. Report 103-703, 103d Cong., 2d Sess. 17 (1994).

biguity of the Home Viewer Act, "it would not assume the economic risk that the Home Viewer Act might be interpreted in such a fashion as to require PNC to treat KCHF's signal as distant for copyright purposes."[4] PNC points to §614(h)(1)(B)(ii) of the Communications Act and §76.55(c)(2) of the Commission's Rules which provides that a commercial television station is not entitled to mandatory carriage if that station would be considered a "distant signal" under §111 of the Copyright Act and if that station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage of the station's signal on the cable system. PNC argues that in enacting §614 of the Communications Act, Congress made clear that it intended to shift the economic risk and consequences of carriage of a "distant" signal to the licensee of that station and to relieve the cable operator of any liability for such carriage. PNC notes that this could be accomplished by Son agreeing to indemnify PNC for the amount of copyright fees owed by PNC as a result of carriage of KCHF's signal and as a result of reporting such carriage to the U.S. Copyright Office as carriage of a "distant" signal. Absent such agreement, PNC states that it would have no alternative but to deny Son's request.

7. Finally, PNC states that Son claims that there is no requirement for a station obligated to indemnify a cable operator against increased copyright liability to place (indemnification) funds in escrow. PNC argues that while it is true that the Commission's Rules do not require such an escrow, they do not prohibit it. PNC states that since §76.55(c)(2) of the Commission's Rules is clearly intended to assure that affected cable systems are fully indemnified, it is both reasonable and proper that the indemnification funds be available upon demand. Therefore, PNC claims that the establishment of an escrow for a single semi-annual copyright accounting period is in full compliance with applicable Commission rules and policies.[5] PNC also contends that the Commission has jurisdiction only to interpret the provisions of the Communications Act and the Commission's Rules, and lacks jurisdiction to interpret the provisions of the Copyright Act, and that any attempt would not and could not be given definitive, binding, and authoritative status. PNC adds that the U.S. Copyright Office lacks the same authority since it is not an enforcement agency. As such, PNC maintains that no interpretation of the Copyright Act, as purportedly amended by the Home Viewer Act, can be relied upon unless such interpretation is rendered by a court of competent jurisdiction. PNC states that in the unlikely event that the Commission were to attempt to interpret the effect of the Home Viewer Act, there is no assurance that a court would not render a contrary decision. These unique circumstances, argues PNC, make it imperative that PNC not be forced to carry the signal of KCHF on PNC's Rio Rancho system unless and until Son agrees to the terms set forth in the most recent Indemnification Agreement. Absent such indemnification, PNC states that the signal of KCHF is not "copyright free" as it relates to PNC's Rio Rancho system, and therefore, does not qualify for must-carry status.

8. In its reply, Son begins by noting that although it is willing to enter into a reasonable indemnification agreement to ensure expedited carriage of KCHF on PNC's cable system, it is not willing to enter into the overly broad and expansive Agreement proposed by PNC- especially since there is no obligation for it to do so. Son then argues that PNC's claim that there is confusion and/or uncertainty concerning the intent of the Satellite Home Viewer Act of 1994 lacks merit. Specifically, Son states that while PNC claims that the anomaly articulated by the House Judiciary Committee never existed in law or fact, the anomaly is that stations in the same ADI, such as the Albuquerque ADI, would be deemed local or distant (and thus subject to copyright royalty fees) solely based on whether a cable system was located more than 35 miles from a station's city of license. Son further maintains that a station, whose city of license happened to be more than 35 miles from a cable system, would be required to pay copyright liability fees while another station located within the same ADI, which fortuitously happened to be closer, did not. Son argues that this created a great economic disparity between stations in the same market, which Congress properly addressed in amending the (Copyright) Act.

9. Son adds that the Commission has held that stations located within the same ADI as a cable system are no longer considered distant signals on that cable system due to the passage of the Satellite Home Viewer Act of 1994, and that indemnification is necessary only in cases involving carriage of a distant signal.[6] Because PNC's Rio Rancho system and KCHF are in the same Albuquerque ADI, Son states that KCHF is not a distant signal and, therefore, Son is not required to indemnify PNC. In addition, as it is undisputed that KCHF provides an adequate signal at PNC's Rio Rancho headend, Son argues that PNC should be ordered to commence carriage of KCHF.

## DISCUSSION

10. We will grant Son's carriage complaint against PNC. We begin by noting that §614(a) of the Communications Act of 1934, as amended, states that each cable operator shall carry the signals of local commercial television stations. A local commercial television station is defined as any full power broadcast television station which is within the same television market as the cable system, such as KCHF in the instant case.[7] For purposes of the Commission's must-carry rules, the television market of a local commercial station is its ADI as determined by Arbitron.[8] In this case, PNC believes that KCHF's signal should be considered "distant" for must-carry purposes. We do not agree.

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[4] *See* PNC letter dated December 8, 1994.

[5] PNC states that the issue of an escrow is now moot, because in an effort to reach an amicable solution, PNC suggested an alternative Indemnification Agreement which would not require any advance escrow funds by Son.

[6] Son cites *Mountain Broadcasting Corporation*, CSR-4225-M (released June 26, 1995) in which the Commission ordered carriage of a station on a cable system in the same ADI, despite the cable company's assertion that the signal was a "distant signal."

[7] 47 U.S.C. §534(h)(1)(A); *see also* 47 C.F.R. §76.55(c).

[8] 47 U.S.C. §534(h)(C)(i); 47 C.F.R. §76.55(e)(1). Each county in the contiguous United States is assigned by Arbitron exclusively to one ADI, and that each broadcast station licensed to a community located in an ADI is considered local throughout that ADI. *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2975 (1993).

11. PNC correctly states that under §111(f) of the Copyright Act of 1976, the term "local service area of a primary transmitter, in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976."[9] These rules, however, have been superseded. We note that, despite PNC's argument to the contrary, §3(b) of the Satellite Home Viewer Act of 1994 amends §111(f) of title 17, with reference to the definition of "local service area of a primary transmitter" by inserting after "April 15, 1976," the following: "or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations." This portion of the Act clearly provides that a station located within the same ADI as a cable system is no longer considered a "distant signal" on that system for purposes of compulsory copyright license liability and, therefore, is not subject to the additional copyright fees. Applying the Act to the facts in this proceeding, we find that KCHF is not considered a "distant signal" if carried on cable systems in the Albuquerque ADI and, therefore, would not face additional copyright fees if carried on PNC's Rio Rancho system.

**ORDER**

12. Accordingly, the complaint filed on February 7, 1995, on behalf of Son Broadcasting, Inc., licensee of Television Broadcast Station KCHF (Ind., Channel 11), Santa Fe, New Mexico, IS GRANTED, pursuant to §615 of the Communications Act of 1934, as amended (47 U.S.C. §535). KCHF shall notify Post-Newsweek Cable, Inc. in writing of KCHF's carriage and channel position election (§§76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order;* and Post-Newsweek Cable, Inc., IS ORDERED to commence carriage of KCHF on its cable television system serving Rio Rancho, New Mexico sixty (60) days from Post- Newsweek's notification.

13. This action is taken pursuant to authority delegated under §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[9] 17 U.S.C. §111(f).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**August 9, 1995**

**Released: August 16, 1995**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Oregon Television, Inc.
Licensee, KPTV(TV)
735 S.W. 20th Place
Portland, OR 97205

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars ($10,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia,* limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming,* 6 FCC Rcd 2111, 2118, *Recon. granted in part,* 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming,* 6 FCC Rcd 5529, 5530 (1991).

On September 30, 1993, you filed an application for renewal of license (FCC Form 303-S) for station KPTV(TV), Portland, OR (File No. BRCT-930930KI). In a supplement to that renewal application you state that during the previous license term KPTV(TV) did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 6 to your application you state that between August 12, 1992, and March 30, 1993, KPTV exceeded the commercial limitations on children's programming on eight occasions. Of these overages, one was two minutes in duration; five were thirty seconds or less in duration; and two were of unspecified duration.[1] You state that all of these overages resulted from inadvertence. With regard to three of these overages, you state that they resulted from schedule changes and program preemptions, where children's programs were rescheduled during time periods normally occupied by general-audience programming; and you assert that the Commission "has specifically noted that late changes in scheduling of children's programs will be taken into account in deciding whether to allow for extenuating circumstances", citing *Children's Television Programming,* 6 FCC Rcd at 2126 n.123. Further, you state that additional review procedures and instructions were issued to appropriate station personnel to prevent future occurrence of such overages. Finally, you state that, on an unspecified number of occasions, "costumed characters identified with 'Chuck E. Cheese Pizza Time Theater [restaurant]'" appeared as guests on a locally produced children's program "usually incidental to the award of prizes or birthday greetings to those in the child audience"; and that the station "broadcast an identification of the restaurant as the provider of these characters that... included a picture of the facility and approximately eight seconds of identification of its locations." However, you state that KPTV(TV) did not include these announcements in its calculation of commercial matter for two reasons. First, you assert that the references to the restaurant were *de minimis.* Second, you assert that, although the restaurant was an advertiser on the station, it "did not condition its purchase of time on any commitment by KPTV to use these characters or to mention who furnished them", and, therefore, the references to the restaurant "[we]re not 'part of a program package for which the broadcaster... receives consideration'", citing and quoting from *Children's Television Programming,* 6 FCC Rcd at 2124 n.25.

In an amendment to KPTV(TV)'s renewal application filed on December 21, 1993, you state that, on November 27, 1993, KPTV(TV) exceeded the commercial limits by 20 seconds because of an "inadvertent error [which] resulted from [an] unforeseen delay" in the preceding program.

In an amendment dated September 22, 1994, you reiterate your argument that the references to Chuck E. Cheese Pizza Time Theater restaurant and the appearances by costumed Chuck E. Cheese characters during a locally produced children's program did not constitute commercial matter because the station did not receive consideration for such references/appearances, asserting that the only benefit received by the station was "enhancement of the program's entertainment value." In addition, you state that it is the station's policy to not broadcast paid advertisements for "Chuck E. Cheese" during the programs on which the costumed "Chuck E. Cheese" characters appear, but that, despite this policy, a 30-second "Chuck E. Cheese" advertisement was inadvertently broadcast on one occasion in June, 1994.[2] However, you argue that this was not a violation of the children's television commercial limits (i) because the program on which both the Chuck E.

[1] In an amendment filed on February 2, 1994, you state that one of these unspecified overages was 40 seconds in duration.

[2] This incident occurred after the expiration of the license term for which renewal is sought. However, since the station's renewal application is still pending, it is being considered in connection with the other incidents listed in that application.

Cheese characters and the Chuck E. Cheese commercial advertisement appeared "is a one-hour program in which the host interacts with his studio audience in a variety of routines, interspersed with many different cartoons", and, therefore "[i]t is... not a program associated with' Chuck-E-Cheese" within the meaning of the Commission's program-length commercial policy, citing and quoting from *Children's Television Programming (Recon.)*, 6 FCC Rcd at 5098; and (ii) because the Commission's program-length commercial policy "requires only 'an adequate break in program content to shift a child's attention,'", and the Chuck E. Cheese commercial advertisement in question was separated from the appearance of the Chuck E. Cheese characters by "approximately thirty minutes" of allegedly "intervening and unrelated program material", citing and quoting from *Children's Television Programming (Recon.), id.* at 5099.

In an amendment filed on February 8, 1995, you state that, despite pre-screening and logging procedures, KPTV(TV) broadcast commercial announcements for "Exosquad toys" during the "Exosquad" program on two occasions in December, 1994.[3] You further state that this occurred as a result of human error, and that the station immediately took steps to prevent recurrence.

In an amendment filed on April 3, 1995, you state that on March 7, 1995,[4] KPTV(TV) exceeded the commercial limitations on children's programming by 10 seconds during one one-hour time period due to the fact that the preceding general-audience program "ran later than scheduled, because of a computer error in the playback equipment", causing ten seconds of a commercial scheduled in the preceding hour to run over into the clock hour during which children's programming was broadcast. You argue that this overage should be considered *de minimis* because it was "isolated and inadvertent" and because it "result[ed] solely from scheduling difficulties", citing *Children's Television Programming*, 6 FCC Rcd at 2117, 2126 n.123.

## DISCUSSION

*Program-Length Commercials.* You state that the appearances by the Chuck E. Cheese costumed characters, prize giveaways, and restaurant identifications were a regular feature on the children's program in question, occurring as often as twice a week. Their use as a *regular feature* on the program creates a clear and obvious association between the restaurant and the program. This clear and obvious association is not eliminated merely because the program may include cartoons or other segments which are not themselves associated with the Chuck E. Cheese restaurant or characters. Thus, where a paid advertisement for the Chuck E. Cheese restaurant is broadcast during a program on which the restaurant characters, prizes, and/or identifications are featured, it is clearly a case of a program associated with a product in which a commercial for that product is aired, *i.e.*, a program-length commercial. You assert that the two programs on which both the Chuck E. Cheese characters and the Chuck E. Cheese commercial advertisement appeared were not program-length commercials because the Chuck E. Cheese advertisements were separated from the appearances of the Chuck E. Cheese characters by "approximately thirty minutes" of allegedly "intervening and unrelated program material", citing and quoting from *Children's Television Programming (Recon.), id.* at 5099. However, this assertion is without merit. In providing that commercial material related to one children's program, but separated from that particular program by "intervening and unrelated program material", would not be considered a program-length commercial, the Commission specifically stated that "a commercial related to a children's program c[an] not air until *after the start of a different, unrelated program.*" (Emphasis added.) *Id.* 6 FCC Rcd at 5099 n.88. The broadcast of a Chuck E. Cheese commercial advertisement on the *same program* as an appearance by the Chuck E. Cheese restaurant characters, prizes, and identifications constitutes a program-length commercial, despite the fact that the commercial advertisement and the appearance by the characters may have been separated by thirty minutes of that same program.

*Schedule Changes.* In *Children's Television Programming*, 6 FCC Rcd at 2126 n.123, the Commission stated that "an occasional *emergency* scheduling change" (emphasis added) would be taken into account in determining whether there were extenuating circumstances surrounding a violation of the children's television commercial limitations. Upon reconsideration, the Commission affirmed this policy, stating that, "*where the facts demonstrate* that a slight overage is caused by a *last minute, emergency* scheduling change, we will consider such a lapse to be *'de minimis.'*" (Emphasis added.) *Children's Television Programming (Recon.)*, 6 FCC Rcd at 5096. However, the Commission further stated that *foreseeable* scheduling changes will not excuse or mitigate violations of the children's commercial limitations. *Id.* In your renewal application, as amended, you cite two instances where unforeseen delays in general-audience programs caused schedule disruptions resulting in overages (of 20 and 10 seconds, respectively) in the children's programs that followed. Such *unforeseen* delays caused by equipment problems are the kind of "last minute emergency scheduling change[s]" which render the resulting slight overages *de minimis* under the policy established by the Commission. However, you also cite three overages which resulted from schedule changes and program preemptions, where children's programs were rescheduled during time periods normally occupied by general-audience programming. You have not even alleged, much less demonstrated, that these schedule changes were either unforeseen or resulted from any emergency. In the absence of any facts to the contrary, these appear to be routine, foreseeable schedule changes which do not excuse or mitigate the resulting violations.

KPTV(TV)'s record of exceeding the Commission's commercial limits on children's television programming on 11 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Oregon Television, Inc. is hereby advised of its apparent liability for forfeiture in the amount of ten thousand dollars ($10,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages

[3] *See* footnote 2, *supra*.
[4] *See* footnote 2, *supra*.

occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993). A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*"Policy Statement/ Assessing Forfeitures"*), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (1995); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (1995).

The 11 occasions on which KPTV(TV) exceeded the hourly limits on commercial matter during children's programming is a significant number of violations. Moreover, while only one (or possibly two) of the overages were 60 seconds or greater in duration, three were program-length commercials. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18. In addition, when the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...[and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of transitional difficulties." *Children's Television Programming, supra* 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that would have prevented Station KPTV(TV) from complying with the children's television commercial limitations during the last license period. In view of the violations that occurred, it is apparent that KPTV(TV) initially did not establish an effective program to monitor compliance with the children's television commercial limitations. Finally, the fact that KPTV(TV) may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $10,000.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, we do not believe that these violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station KPTV(TV) would serve the public interest, convenience and necessity. Therefore, the license renewal application of Oregon Television, Inc., File No. BRCT-930930KI, for Station KPTV(TV), Portland, OR, IS HEREBY GRANTED for a term to end on February 1, 1999.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure
cc: William R. Richardson, Jr., Esq.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

AMERICAN MUSIC RADIO
(Assignor)

and File No. BAL - 930210ED

KHYM, INC.
(Assignee)

For Assignment of License of
KHYM(AM), Gilmer, Texas

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 31, 1995; Released: August 16, 1995**

By the Commission:

1. The Commission has under consideration: (1) an Application for Review filed on March 31, 1994 by J.R. McClure ("McClure"); (2) a Joint Opposition to Application for Review ("Joint Opposition") filed on April 15, 1994 by American Music Radio ("AMR") and KHYM, Inc., the proposed assignor and assignee in the above-captioned application; and (3) a Reply to Joint Opposition to Application for Review ("Reply") filed on April 29, 1994 by McClure.

2. McClure requests review of an action by the Chief, Audio Services Division, approving the above-captioned application for assignment of license. By letter to Denise B. Moline dated February 23, 1994 ("Letter to Denise Moline"), the staff dismissed a petition to deny the above-captioned assignment of license filed by McClure, and considering the petition to deny as an informal objection pursuant to Section 73.3587 of the Commission's Rules, 47 C.F.R. § 73.3587, denied the informal objection and granted the license assignment application.[1]

3. In the Application for Review, McClure assigns as error two conclusions by the staff: (1) that there had been no unauthorized transfer of control of the license of KHYM from AMR to KHYM, Inc.; and (2) that the application did not propose assignment of a bare license in contravention of Commission policy. After considering the arguments raised in the Application for Review, together with the Joint Opposition and the Reply, we conclude that the staff did not err in its determinations. Therefore, we deny the Application for Review and affirm grant of the above-captioned application for assignment of license.

## I. BACKGROUND

4. McClure is the former owner of KHYM, having operated the station between 1973 and 1985. McClure sold the station to Blount Communications in 1985, which then sold the station to Fairchild Communications, Inc. in 1987. AMR purchased the station from Fairchild Communications, Inc. in 1991, assuming a note payable to McClure. After AMR defaulted on the note, McClure obtained a default judgment against Al Petty and Vern Coldiron, the two general partners of AMR, on November 23, 1992. By the terms of the default judgment, Mr. Petty and Mr. Coldiron were held jointly and severally liable on the note in the amount of $290,563.89.[2]

5. KHYM went dark after AMR lost its transmitter site and broadcasting equipment in foreclosure proceedings in June 1992. In contemplation of a proposed station sale, AMR entered into two agreements with the proposed assignee, KHYM, Inc. On August 15, 1992, pursuant to a Construction and Rental Agreement, KHYM, Inc. agreed to construct technical and studio facilities for KHYM, and thereafter to lease the facilities to AMR for a monthly rental fee. On December 1, 1992, AMR and KHYM, Inc., entered into a Program Service Agreement, whereby KHYM, Inc. agreed to provide AMR with programming and to broker substantially all of KHYM's air time in exchange for a monthly fee paid to AMR.

6. AMR and KHYM, Inc. filed the above-captioned application to assign the license of KHYM on February 10, 1993.[3] A petition to deny the application was filed by the First National Bank of Gilmer ("First National"), a creditor of AMR, on March 24, 1993. McClure filed an informal objection, styled as a petition to deny, on the same date. First National and McClure both contended that the agreements for rental of facilities and time brokerage entered into between AMR and KHYM, Inc. had resulted in a *de facto* unauthorized transfer of control of the license of KHYM in violation of Section 310(d) of the Communications Act of 1934, as amended. Both also argued that AMR is proposing to transfer a bare license to KHYM, Inc. in light of First National's foreclosure action on all of the station's operating assets. The staff found that AMR had not abdicated control, but instead had maintained control over the basic operating policies of KHYM, including personnel, programming and finances. The staff also found that since KHYM, Inc. possesses the technical facility required to assure continuation of broadcast service, the proposed assignment does not contravene Commission policy by proposing the assignment of a bare license.

## II. PLEADINGS

7. McClure argues in his Application for Review that KHYM, Inc. maintains control over KHYM, since AMR has no assets and, according to his interpretation of the relevant agreement, any termination of the Program Service Agreement would force the station off the air. McClure further argues that AMR has no immediate right to terminate the Program Service Agreement for compelling public interest reasons. McClure claims that, pursuant to

[1] In his Application for Review, McClure does not challenge the decision to dismiss his petition to deny and to treat it as an informal objection.

[2] *McClure v. Petty and Coldiron*, No. 384-92 (D. Ct. Upshur County, Tex. Nov. 23, 1992) (Final Summary Judgment).

[3] AMR and KHYM, Inc. report that, effective April 14, 1994, they consummated the sale of KHYM, conditioned upon final approval of assignment of the station license by the Commission.

the Construction and Rental Agreement, KHYM, Inc. has "absolute control" over how long "rent" is paid. McClure asserts that, in view of the circumstances surrounding the execution of both agreements, it is "hard to believe" that AMR maintains control over the finances of the station. McClure also states that he finds it "counterintuitive" and "too good to be true" that an outside party would enter into the agreements with AMR without exercising control. McClure also argues that this assignment falls into the "bare license" category because it is not a case where the buyer is acquiring a station license as well as operating assets from another separate entity. McClure asserts that, in the present assignment, the buyer is acquiring "*only* the license."

8. In their Joint Opposition, AMR and KHYM, Inc. respond that McClure's Application for Review fails to meet the procedural requirements of Section 1.115(b) of the Commission's rules, 47 C.F.R. § 1.115(b), governing applications for review. AMR and KHYM, Inc. assert that McClure has neither presented clearly and concisely the precise issues for determination by the Commission, nor has he indicated what factors, if any, would warrant the Commission's review of this matter, as required by 47 C.F.R. § 1.115(b).[4]

9. Concerning the alleged unauthorized transfer of control, AMR and KHYM, Inc. contend that McClure's claims that the disputed contractual provisions create *de facto* control in KHYM, Inc. through KHYM, Inc.'s asserted power to terminate the agreement and take the station off the air at any time are mere speculation. AMR and KHYM, Inc. assert that AMR has the power to reject programming, and that AMR maintains control of its own and station accounts, and is solely responsible for payment of utilities, maintenance, insurance and repair expenses, and equipment rental. Furthermore, AMR and KHYM, Inc. point out that AMR's general partner, Vern Coldiron, is present on a day-to-day basis and manages and supervises all station operations. AMR and KHYM, Inc. dispute McClure's claim that KHYM, Inc. may terminate the existing agreements on a unilateral basis. AMR and KHYM, Inc. assert that while AMR may terminate the existing arrangements immediately and at any time, it is KHYM, Inc. that is bound to give 90 days' notice prior to termination, in order to enable AMR to seek alternative arrangements for continued operations. According to AMR and KHYM, Inc.'s interpretation of their agreement, AMR maintains the power to "pull the plug" on KHYM, Inc., but not vice versa.

10. Concerning the alleged transfer of a bare license, AMR and KHYM, Inc. argue that AMR proposes to transfer, in effect, an operating station with value as a going concern. They note that the station is presently broadcasting, and that assignment of the license will result in continued operation of the station.[5] AMR and KHYM, Inc. argue that the fact that the buyer in this instance already possesses the physical facilities to maintain the station, as opposed to acquiring the assets elsewhere, should not constitute a meaningful distinction that would preclude the proposed assignment. AMR and KHYM, Inc. state that the cases relied upon by McClure for the proposition that a bare license is being transferred are distinguishable as cases in which the Commission had no assurance whatsoever that the proposed assignees had access to the site and/or equipment necessary for resumption of station operations. By contrast, they argue, the Commission has demonstrated a willingness to grant an assignment of license without assets where it could be shown that assets were available and that the station would be returned to operation within a reasonable period of time.

11. In his Reply, McClure reiterates his contention that the contractual arrangements between the parties indicate that control lies with KHYM, Inc., asserting that "the contracts speak for themselves."[6] McClure replies that AMR and KHYM, Inc.'s position that AMR may terminate the existing agreements immediately and at any time is "totally unsupported by the agreements." McClure points to Section 1.2 of the Program Service Agreement, which he says gives AMR the right to terminate only on 90 days written notice -- not immediately and at any time as AMR and KHYM, Inc. contend. More significantly, McClure argues, if the termination by AMR is contested, any dispute is to be resolved by arbitration. McClure asserts that the arbitration clause is not limited to calculating damages, but provides specifically for determination of whether AMR has reasonably invoked the termination provision. Furthermore, McClure asserts that KHYM, Inc. maintains undue contractual control over AMR, since Section 1.3 of the Program Service Agreement allows KHYM, Inc. to terminate on 90-days' notice for any reason, and Section 1.4

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[4] While the Application for Review does not specify with particularity the factor(s) which warrant Commission consideration under 47 C.F.R. § 1.115(b), the pleading does generally suggest that the action taken by the staff pursuant to delegated authority is in conflict with case precedent and established Commission policy. Thus, we will consider the Application for Review as specifying that Commission review is warranted under 47 C.F.R. § 1.115(b)(2)(i). *See, e.g., Noble Syndications, Inc.*, 74 FCC 2d 124, 128 (1979) (finding sufficient particularity under 47 C.F.R. § 1.115(b)(2) where a fair reading of the pleading indicated that the applicant was attempting to argue that a ruling conflicted with case precedent or established Commission policy).

[5] KHYM resumed operation in December 1992, and is currently on the air.

[6] McClure also questions Mr. Coldiron's claimed continued presence and operation of KHYM in light of local litigation pending between AMR and KHYM, Inc. as recently as March 1994. McClure attaches as Exhibit 1 two pleadings related to settlement of a civil action between KHYM, Inc. and AMR. *KHYM, Inc. v. American Music Radio*, No. 2-93CV202 (E.D. Tex. filed 1993) (Joint Motion to Dismiss filed by KHYM, Inc. and AMR ("Joint Motion"); Response to Joint Motion to Dismiss filed by First National and McClure ("Response")). In the Joint Motion, KHYM, Inc. and AMR request court approval of a settlement agreement and request release of money deposited by KHYM, Inc. in escrow to Al Petty. In the Response, First National and McClure request the court to deny the Joint Motion and to direct payment of such monies to First National and McClure.

It is not clear how these motions call into question Mr. Coldiron's representation of continued presence at and operation of KHYM. There is no evidence that Mr. Coldiron ceased to maintain a daily presence at the station in the wake of this litigation or that he abdicated control of station operations. Consequently, we do not agree that the existence of such litigation between KHYM, Inc. and AMR suggests that an unauthorized transfer of control has occurred.

provides that on such termination, all leases for land, buildings or other broadcast equipment between AMR and KHYM, Inc. will also terminate.

12. McClure also notes that the instant facts are uniquely consistent with precedent describing the assignment of a bare license, since all station assets, other than the license, belong to the assignee, KHYM, Inc. Furthermore, McClure asserts, the Commission should give weight to the fact that any value of the station as a going concern was created, in this case, by the assignee.

## III. DISCUSSION

### A. Unauthorized Transfer of Control

13. Section 310(d) of the Communications Act states in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(d). Section 73.3540(a) of the Commission's Rules provides that the "[p]rior consent of the FCC must be obtained for a voluntary assignment or transfer of control." 47 C.F.R. § 73.3540(a).

14. In ascertaining whether a prohibited transfer of control has occurred, we have traditionally looked beyond legal title to see whether a new entity or individual has obtained the right to determine basic operating policies of the station. *See WHDH, Inc.*, 17 FCC 2d 856, 863 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming and finances, is nondelegable. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). The existence of a time brokerage or local marketing agreement will not constitute an unauthorized transfer of control under Section 310(d) of the Act unless the contract vests a disproportionate degree of control in the broker. *Roy R. Russo*, 5 FCC Rcd 7586, 7587 (MMB 1990).

15. In the instant case, the staff determined that AMR had maintained ultimate control over KHYM's personnel, programming and finances despite the existence of time brokerage and facilities rental agreements. After reviewing the agreements and considering the pleadings in this matter, we affirm the determination of the staff that there has not been an unauthorized transfer of control of the license of KHYM from AMR to KHYM, Inc.

16. *Personnel.* The staff found, on the record before it, that AMR had maintained control over the basic operating policies of the station. In this connection, the staff found it significant that AMR's general partner Vern Coldiron has served as general manager of KHYM on a daily basis since the station returned to the air.[7] Although KHYM's staff consists entirely of volunteers, the Commission staff decision found no evidence that the volunteers report to anyone other than Mr. Coldiron. Nothing in the application for review contradicts these findings and we here affirm them. We also concur in the staff's conclusion, based on these facts, that AMR maintained adequate control over personnel at its station.

17. *Programming.* The staff also found that the disputed provisions of the subject time brokerage agreement were similar to programming arrangements which afford brokers certain programming responsibilities but which we have nonetheless found acceptable because they reserve to the licensee the right to reject programming that it believes would disserve the public interest, and to preempt programming when circumstances warrant. *See* Program Service Agreement at paras. 2.1, 4. Further supporting the conclusion that the licensee retained control over programming in this case was the fact that under the agreement, AMR had reserved to itself one hour of programming each Sunday morning for the presentation of public affairs and other non-entertainment programming. Program Service Agreement at para. 3.[8]

18. McClure argues that the facts of this case are similar to *Weston Properties XVIII Ltd. Partnership*, 8 FCC Rcd 1783 (MMB 1993), in which the Mass Media Bureau assessed a forfeiture against the licensee of WKBR(AM), Manchester, New Hampshire for an unauthorized transfer of control. McClure notes that, as in this case, the programmer in *Weston* established the station format and provided all programming for the station. However, the Mass Media Bureau has determined that reservation in the broker of some power over programming, advertising and sales is characteristic of all time brokerage agreements and is permissible where it does not convey to the broker the ability to make the ultimate decisions in those areas. *See Roy R. Russo*, 5 FCC Rcd at 7587. Furthermore, the instant Program Service Agreement is replete with provisions reserving ultimate control over the broadcasting content of KHYM to AMR.[9] Although similar provisions were included in the management contract in *Weston*, the Mass Media Bureau rejected the licensee's argument that it had maintained control by virtue of its management contract. The Bureau found that the terms of the management contract in *Weston* were specifically contradicted by other terms in the contract and by the totality of circumstances, including the facts that the manager collected all the revenues, paid all the expenses, selected all the programming, and hired the employees, if any. *Weston*, 8 FCC Rcd at

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[7] *Cf. Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (MMB 1991) (station lease/sale agreement resulted in unauthorized transfer of control where, *inter alia*, licensee failed to maintain daily management presence at station).

[8] This is consistent with Commission precedent that the Commission will not set limits on the amount of time a brokered station is permitted to sell. *See Brian M. Madden*, 6 FCC Rcd 1871 (MMB 1991).

[9] *See* Program Service Agreement at para. 2.1 (entitled "Control Vested in AMR") and para. 4 ("AMR shall have the right to reject or refuse programs which it reasonably believes to be contrary to the public interest.").

1785. Here, McClure has not adduced any facts sufficient to show that AMR and KHYM, Inc. were operating outside the terms of the Program Service Agreement or that these other countervailing considerations present in *Weston* are present here. Furthermore, we concur that the Program Service Agreement did not vest an impermissible degree of authority in KHYM, Inc.

19. *Finances.* The staff also determined that AMR had retained control over finances, since it was responsible for paying all station expenses. McClure states that it is "hard to believe" that AMR controls the finances of the station, but he does not provide any evidence to the contrary. To the extent that McClure finds it "counterintuitive" and "too good to be true" that an outside party would enter into the agreements with AMR without exercising control, we find his opinion to be merely speculative and unsupported by any facts presented on the record in this case.

20. With respect to finances, McClure again argues that this case is similar to *Weston* in that the licensee in *Weston* was paid a monthly lease fee and had no real financial responsibility for the station. But in *Weston,* the Mass Media Bureau found an unauthorized transfer of control where, pursuant to a management contract, the manager collected all revenues and paid all expenses, exercising complete control over station finances. *Weston,* 8 FCC Rcd at 1785. Here, AMR has demonstrated that it has maintained responsibility for payment of utilities, maintenance, insurance and repair expenses, and equipment rental. This is not a case in which a licensee has been reduced to a mere "lessor" of the station. *See Benito B. Rish, M.D.,* 6 FCC Rcd 2628 (1991), *forfeiture ordered,* 7 FCC Rcd 6036 (1992), *recon. granted in part, denied in part,* FCC 95-103 (released Mar. 16, 1995); *Salem Broadcasting, Inc.,* 6 FCC Rcd at 4173. Instead, the payment of a monthly fee to AMR is consistent with consideration that has historically supported time brokerage agreements. *See United Broadcasting Co. of New York, Inc.,* 4 RR 2d 167, 173 (1965).

21. *Contractual Control.* As evidence of KHYM, Inc.'s undue contractual control, McClure cites Section 1.2 of the Program Service Agreement, which states in the *second* sentence of subsection (b) that AMR will give KHYM, Inc. ninety (90) days written notice of its intent to terminate. McClure also assigns special significance to the fact that, under subsection (d), if the termination is contested, any dispute is to be resolved by arbitration. But the *first* sentence of subsection (b) provides that "AMR shall have the right, which will not be unreasonably invoked, to terminate this Agreement at any time for reasons of compelling public interest." We note that the agreement does not provide KHYM, Inc. with a corresponding right. The licensee's agreement to give 90-days advance notice for termination does not unduly restrict its control over the station because the agreement itself contains an exception to the requirement to give such prior notice if such provision were otherwise contrary to law. On the other hand, KHYM, Inc. is compelled to provide 90-days notice to the licensee before termination, thus providing the licensee with a period of time in which it could arrange for alternative facilities. McClure has cited no precedent suggesting that such contractual provisions are tantamount to *de facto* control in the time broker, and we see no basis in these arrangements to find such a transfer here.[10]

22. The assignor and assignee have sufficiently demonstrated that AMR has maintained control over the basic operating policies of KHYM, including personnel, programming, and finances. The decision of the staff in this respect is therefore affirmed.

**B. Bare License**

23. The Commission will not permit a price to be placed on the transfer of a bare license. *Donald L. Horton,* 10 FCC 2d 271, 273 (1967). *Accord Edward B. Mulrooney,* 13 FCC 2d 946 (1968); *Bonanza Broadcasting Corp.,* 10 FCC 2d 906 (1967). Because the Commission's bare license policy emphasizes the ability of a silent station to return to the air quickly, the Commission has not considered the license "bare" if the licensee can assign its rights to the accompanying station facilities under a lease to the buyer. *Public Service Enterprises, Inc.,* 69 FCC 2d 967, 972-73 (1978). The Commission has also viewed separate transactions involving transfer of a license and equipment to the assignee as constituting a single transaction for purposes of applying the bare license policy. *Van Schoick Enterprises, Inc.,* 58 FCC 2d 341 (1976); *see also Arecibo Radio Corp.,* 101 FCC 2d 545 (1985) (finding no transfer of bare license where physical assets and license assigned to the same buyer in two separate, court-ordered transactions, subject to prior Commission approval).

24. The staff concluded that, even if AMR had only KHYM's license to convey to KHYM at closing, KHYM possessed the technical facility required to assure continuation of broadcast service. Accordingly, the staff found that the proposed assignment did not contravene Commission policy, citing *Van Schoick.*

25. McClure contends that the instant assignment here is similar to that denied in *Mulrooney,* 13 FCC 2d at 946, where the licensee had lost title to and possession of its broadcasting equipment, and the real property for its transmitter site had been repossessed. However, unlike the in-

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[10] The arbitration clause, para. 1.2(d), provides for binding arbitration by a panel of three arbitrators: one selected by AMR, one by KHYM, Inc., and one by mutual consent. The clause governs any dispute between the parties concerning termination by AMR based on public interest grounds, including: (1) whether AMR has reasonably invoked Section 1.2; (2) whether AMR's grounds for terminating constitute a compelling public interest other than changes in FCC rules and/or policies; and (3) whether KHYM, Inc. has satisfied its obligations to correct the situation or to take steps in good faith to promptly correct the situation and provide assurances reasonably adequate to AMR that it will correct the situation. Section 1.2(a) recites that "[t]he parties recognize that changes in the rules and regulations and/or the policies of the [FCC] may necessitate modification and/or cancellation of any or all parts of [the Program Service Agreement]."

The staff found that the arbitration clause represented a private contractual mechanism for affixing liability for damages arising from termination rather than the preemption of AMR's right to invoke such remedy in connection with its continuing responsibility as a Commission licensee. We agree that the arbitration clause should not inhibit the ability of AMR to exercise control over the basic operating policies of KHYM, including personnel, programming and finances. The arbitration clause appears designed merely to ensure the reasonableness, and thus, the good faith, of any decision by the licensee to terminate the time brokerage agreement on public interest grounds.

stant case, the buyer in *Mulrooney* had not demonstrated the availability of equipment or a site from which to operate the station. Here, the buyer, KHYM, Inc., leases the transmitter site and equipment to AMR. Subsequent to termination of the lease agreement, KHYM, Inc. will enjoy possession of the transmitter site as well as equipment and studio/office space for continued operation of KHYM.

26. McClure also attempts to distinguish *Van Schoick* on the basis that in *Van Schoick*, the buyer was acquiring a station license as well as operating assets from another separate entity, whereas here, the buyer is acquiring only the license. McClure's analysis ignores the fact that under the terms of the instant lease, AMR is entitled to immediate possession of the operating assets. Thus, this case is similar to *Public Service Enterprises*, in which the Commission allowed a licensee to assign its rights to a station's facilities under a lease to the buyer.[11] It is of no consequence that, in the present case, the buyer's right to possession of the proposed facilities arises from the termination, and not the transfer, of an existing lease. We also find it significant that the buyer will acquire operating assets along with the license so that it will be able to continue station operations subsequent to the assignment.[12]

## IV. OTHER MATTERS

27. McClure filed a complaint with the Commission on March 23, 1995, alleging that KHYM, Inc. had failed to place on file with the Commission a copy of a contract for further sale of the station from KHYM, Inc. to Wayne Shultice, in violation of Section 73.3613 of our Rules, 47 C.F.R. Section 73.3613, and that KHYM, Inc. had failed to place a copy of this contract in the station's public inspection file, in violation of 47 C.F.R. Section 73.3526. KHYM, Inc. has responded with affidavits from Don Werlinger, President of KHYM, Inc., and Shultice, parties to the sales contract, attesting that the contract never became effective because both parties understood pursuant to an oral side agreement that the contract would only become effective if the Commission denied McClure's instant Application for Review, thus finalizing the assignment from AMR to KHYM, Inc. KHYM, Inc. concedes that such a contract, if effective, would be required to be filed under our rules. The contract was terminated by KHYM, Inc. on April 15, 1995, because Shultice had defaulted on payments due under a separate program service agreement. KHYM, Inc. asserts that as of April 20, 1995, no contract for further sale of the station exists, and there are no other agreements or understandings that affect present ownership or control of the station. Although we find that based on these facts no further action is warranted concerning this matter, parties are cautioned to refrain from entering into agreements that, construed in the absence of side agreements, appear to implicate our rules.

28. McClure's complaint also alleges that the licensee is in violation of the main studio rule and may have engaged in an unauthorized transfer of control based on the apparent absence of station employees observed at the main studio during a "regular business hours" visit by Van Bullock, McClure's former employee. In response, the licensee explains that the apparent temporary absence of the licensee's staffers was in response to a transmitter site emergency and does not demonstrate a *per se* violation of our main studio policy or an unauthorized transfer of control respecting the time broker (Shultice), who happened to be at the station when McClure's former employee visited. We agree. Moreover, we find McClure's implication that no management presence was maintained for a substantial period of time to be both speculative and based upon unreliable hearsay, *i.e.*, Bullock allegedly overheard a local postmaster tell Shultice that mail could not be delivered at the station for several days in late November, 1994. Accordingly, we find that McClure's complaint fails to raise issues warranting further inquiry respecting the station's operation.

## V. CONCLUSION

29. After carefully examining the arguments raised in the Application for Review, together with the Joint Opposition and the Reply, we conclude that the staff did not err in determining: (1) that there had been no unauthorized transfer of control of the license of KHYM from AMR to KHYM, Inc.; and (2) that the application did not propose assignment of a bare license in contravention of Commission policy. We have carefully examined the assignment application and affirm the staff's determination that KHYM, Inc., based upon its representations, is otherwise qualified to be a Commission licensee.

30. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the "Application for Review" filed on March 31, 1994 by J.R. McClure IS HEREBY DENIED. IT IS FURTHER ORDERED, That the Complaint filed by J.R. McClure on March 23, 1995 IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[11] Under the Contract of Sale between AMR and KHYM, Inc., for consideration of $17,500, AMR will assign to KHYM, Inc. the license for KHYM, use of the station's call sign, the station's goodwill, any ongoing programming or advertising contracts, rights to the studio/office lease, and rights to a transmitter site ground lease.

[12] The bare license cases McClure relies upon involved silent stations with no equipment available to resume station operations. *See Mulrooney*, 13 FCC 2d at 947; *Radio KDAN, Inc.*, 11 FCC 2d 934, 935 (1968), *aff'd sub nom. W.H. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969). Earlier cases also involved silent stations without equipment available to "return to the air within a reasonable time." *Bonanza*, 10 FCC 2d at 906; *Horton*, 10 FCC 2d at 273.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re KWQJ(FM), Anchorage, Alaska

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|---|---|
| Application of A.A. Radio Partnership, A Limited Partnership | File No. BPH-860102MM |
| For Extension of Time to Construct | File No. BMPH-920107JE<br>File No. BMPH-940222JD |

Petition for Reconsideration

Application for Review

Motion to Terminate Proceedings

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 31, 1995; Released: August 16, 1995**

By the Commission:

1. The Commission has before it: (1) the February 4, 1994 Petition for Reconsideration of the dismissal of a "Petition to Declare A.A. Radio's Construction Permit Forfeited, and to Reinstate and Grant Duffy's Application" filed by Bobby Duffy ("Duffy"); (2) the February 4, 1994 Application for Review of the denial of a petition for reconsideration of the grant of an extension application for Station KWQJ(FM), Anchorage, Alaska, filed by Duffy; and (3) related pleadings.[1] The actions Duffy challenges were taken January 5, 1994 by the Chief, Audio Services Division, Mass Media Bureau ("Bureau"). *Letter to J. Richard Carr ("Carr")* (reference 1800B3-JR).[2] Also before the Commission are: (3) the captioned application for an additional extension of time to construct Station KWQJ(FM) (File No. BMPH-940222JD), filed on February 22, 1994 by A.A. Radio Partnership, A Limited Partnership ("AA"); (4) AA's October 13, 1994 response to an August 17, 1994 Bureau staff inquiry letter; (5) Duffy's October 24, 1994 comments on AA's response; and (6) Duffy's October 24, 1994 Motion to Terminate Proceedings. For the reasons set forth herein, reconsideration and review are denied, the motion to terminate proceedings is denied, and the request for extension of time to construct is granted.

2. *Background.* AA and Duffy were two of several competing applicants for a new FM station on Channel 255C in Anchorage, Alaska. Duffy had proposed an antenna height below the Class C minimum, and his request for a waiver of 47 C.F.R. §73.211 was denied. In contrast, four other applicants, including AA, proposed facilities complying with the rule. Duffy's application was therefore dismissed as "inadvertently accepted for filing" in the *Hearing Designation Order*[3] under the "hard look" processing standard.[4] Duffy filed a petition for reconsideration of the action dismissing his application (the "1989 Petition"). The Commission denied the 1989 Petition,[5] and Duffy filed a judicial appeal of that action. That appeal is pending in the U.S. Court of Appeals for the District of Columbia Circuit.[6]

3. AA's application, granted August 7, 1990 pursuant to a settlement agreement, was conditioned on the outcome of Duffy's 1989 petition for reconsideration, and AA was cautioned that, pending resolution of Duffy's 1989 petition, any construction undertaken by AA would be at its sole risk. Subsequently, on January 7, 1992, AA applied for an extension of time to construct, referencing as justification the pendency of Duffy spetition for reconsideration of the dismissal of his own permit application.[7] An extension, until August 11, 1992, was granted on February 11, 1992. On March 12, 1992, Duffy filed a second Petition for Reconsideration ("1992 Petition"), seeking reconsideration of the grant of AA's extension request, revocation of AA's permit and cancellation of its call sign. The 1992 Petition further requested that Channel 255C be declared vacant pending final resolution of Duffy's appeal of the action dismissing his permit application. Thereafter, on September 16, 1992, Duffy filed a "Petition to Declare A.A. Radio's Construction Permit Forfeited, And To Reinstate And Grant Duffy's Application" (the "Forfeiture Petition"), repeating and amplifying accusations from the 1992 Petition that AA had falsely certified site availability and had abandoned its project.

4. The 1992 Petition was denied and the Forfeiture Petition dismissed in *Carr*. The Chief, Audio Services Division, held in *Carr* that: (i) AA had "good grounds" for not completing construction of Station KWQJ, *i.e.*, the condition on its permit and "the possibility that the outcome of a related proceeding could render construction efforts in vain;" (ii) Duffy's assertions that AA had abandoned the project of constructing KWQJ(FM) were conjectural at best; and (iii) Duffy had provided no probative evidence that AA lacked assurance of the availability of its transmitter site when it certified site availability in its application. However, in affirming the previous extension grant, the January 5 letter indicated that the pendency of Duffy's Petition for Reconsideration of the grant did not toll the construction period authorized and that AA should have filed another extension request by August 11, 1992. Never-

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[1] AA filed oppositions to the captioned Petition for Reconsideration and Application for Review. Duffy, in turn, filed replies to the oppositions.

[2] The Petition for Reconsideration was purportedly filed to bring new information to the attention of the Chief, Audio Services Division and was directed to him. It has been referred to the Commission pursuant to 47 C.F.R. §1.106.

[3] *Northland Broadcasters*, 4 FCC Rcd 6508, ¶ 3 (MMB 1989).

[4] *See Report and Order* in MM Docket No. 88-118, 4 FCC Rcd 2413 (1989) ("[a]n applicant filing for a new FM allotment during an application filing window must specify the class of channel prescribed in the Table of Allotments.") Duffy's request for a waiver of 47 C.F.R. §73.211 was denied for failure to raise a substantial and material question of fact that the competing proposals which complied with the rule were untenable.

[5] *Bobby Duffy*, 7 FCC Rcd 1734 (1992).

[6] *Bobby Duffy v. FCC*, No. 92-1132 (D.C. Cir., docketed March 31, 1992).

[7] File No. BMPH-920107JE.

theless, given the circumstances, the decision afforded AA a limited opportunity, until January 25, 1994, to file such request. Ultimately, AA filed the captioned extension application on February 22, 1994.

5. *Petition for Reconsideration.* Duffy filed the instant Petition for Reconsideration of the dismissal of its pleading urging recision of AA's permit prior to AA submitting the February 22 extension request. In the Petition for Reconsideration, Duffy argues only that AA's failure to file an extension application by the January 25, 1994 deadline specified in *Carr* validates his earlier position that AA has abandoned its broadcast project.[8] According to Duffy, the now "vacant" channel should be awarded on a "first come-first serve" basis, and, because he has preserved his own application, he has earned the right to be designated "first come."

6. AA, in opposition, denies that it has abandoned the project. According to AA, the extension request was not filed by the January 25, 1994 deadline set forth in *Carr* because neither it nor its counsel timely received a copy of the staff's January 5, 1994 letter.

7. The Commission staff has reviewed its files to determine whether AA and/or its counsel, J. Richard Carr ("Carr"), should have timely received the *Carr* letter. Although this review sheds no light on the address used for AA, it does reveal that the original of the letter was sent to Carr at the wrong address.[9] Inasmuch as the version mailed to Carr was incorrectly addressed, and there is no conclusive evidence concerning the copy sent to AA, it is appropriate to accept AA's explanation for the late filing of its application for an extension of time to construct and to consider the application. This is especially true in light of the fact that Duffy has not shown the explanation to be unreasonable. Accordingly, we reject the premise of Duffy's Petition for Reconsideration – that AA's failure to file is evidence that it has abandoned the project – and deny the Petition.

8. Furthermore, the circumstances justifying grant of AA's previous extension request still apply. Specifically, Duffy's pending judicial appeal renders any construction by AA at its own peril and excuses its failure to proceed. *See Open Media Corporation,* 8 FCC Rcd 4070, 4072 (1993) *citing Meridian Communications,* 2 FCC Rcd 5904 (Rev. Bd. 1987). Therefore, the February 22, 1994 extension request will be granted pursuant to 47 C.F.R. §73.3534(b), which provides in pertinent part that extensions of time to construct may be granted where there has been no progress due to reasons beyond the control of the permittee.

9. *Application for Review.* Duffy seeks review of the action denying reconsideration of the grant of AA's initial request to extend the deadline for completion of construction to August 11, 1992. According to Duffy, because AA never had assurance of a site, its authorization should be revoked, leaving Duffy as the preferred "first come" applicant. Duffy asserts that although he did not submit a statement of Til Wallace ("Wallace"), the site owner, refuting AA's claim that it had reasonable assurance of site availability, he did submit other credible evidence that AA never had a site. Duffy also argues that *Carr* misapplied the law regarding his allegation that Michael Cutler ("Cutler"), AA's limited partner, lacked authority to sign the site assurance document and regarding his assertion that AA's agent, Mobile Radio Systems, Inc. ("Mobile"), has ceased doing business. As noted *supra,* the Mass Media Bureau staff sent AA a letter of inquiry requesting additional information regarding certain questions Duffy's pleading raised.[10] AA responded on October 13, 1994.[11]

10. Duffy's arguments concerning AA's assurance of site availability and related issues concerning Cutler and Mobile were presented and resolved in *Carr.*[12] The correctness of the conclusions reached in *Carr* is reinforced by the information AA supplied in response to the staff inquiry letter.[13] Although Duffy continues to maintain that "AA never had a site," he has not provided probative evidence to counter the written site assurance initially given by Wallace to AA's agent, Mobile. That written site assurance was, under Commission precedent, sufficient.[14]

11. As the staff did in *Carr,* we reject Duffy's argument that the Site Availability Report was invalid because it was obtained by Cutler, AA's limited partner, even though AA's partnership agreement prohibits a limited partner from participating in partnership activities. Even assuming this argument might otherwise have validity, AA's general partner has explained in responding to the inquiry letter that Cutler signed the site availability report *as a principal*

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[8] Duffy argues that filing the limited Petition for Reconsideration preserves for future review questions not raised in the Petition. Petition for Reconsideration at n.1. This argument is without merit. Applications for Review of the *Carr* letter were due thirty days from the date on the letter, or by February 4, 1994. *See* 47 C.F.R. §§1.106(f) and 1.4(b)(5). Applications for Review filed after that date will not be entertained.

[9] The *Carr* letter was addressed to J. Richard Carr. AA was sent a "cc" copy. Thus, the letter itself does not indicate how the envelope with AA's copy was addressed. The version of the *Carr* letter mailed to Carr was addressed to "5528 Trent Street, Chevy Chase, MD 20815." Commission records indicate the consistent use of "P.O. Box 70725, Chevy Chase, MD 20813" as Carr's address since at least April 1992.

[10] *Letter to A.A. Radio Partnership, A Limited Partnership from the Chief, Audio Services Division, Mass Media Bureau,* August 17, 1994 (reference 1800B3-JR).

[11] AA's response was filed beyond the twenty-day period specified in the inquiry letter. However, the response will be considered, inasmuch as it supplements the factual record. To ensure that no party is prejudiced by consideration of the response, we will also consider Duffy's unauthorized Comments on the letter as well as his "Motion to Terminate Proceeding."

[12] Although Duffy asserts that the staff failed to consider various "indices of non-genuineness of the site assurance," it explicitly did so and concluded that they did not raise substantial and material questions of fact. *See Carr, supra,* note 7.

[13] AA's response consisted primarily of numbered answers to the staff's questions and was signed by Jimmie Taylor, AA's general partner. While AA's answers were not completely responsive in every respect, they provided sufficient information to support the staff's conclusion that AA had reasonable assurance of a site at the time it filed its permit application.

[14] Applicants need only demonstrate a reasonable assurance that they will be able to use the specified site should they eventually receive the grant. *See Genessee Communications, Inc.,* 3 FCC Rcd 3595 (Rev. Bd. 1988); *Lee Optical and Associated Companies Retirement and Pension Fund trust,* 2 FCC Rcd 5480, 5486h) (Rev. Bd. 1987); *Arizona Number One Radio, Inc.,* 103 FCC 2d 550 (Rev. Bd. 1986), *rev. denied,* 2 FCC Rcd 44 (1987). The exact terms and details for lease or ownership need not be worked out in advance. *See National Innovation Programming Network, Inc.,* 2 FCC Rcd 5641 (1987).

*of Mobile* and prior to becoming a limited partner of AA.[15] Thus the prohibitions in the partnership agreement are not relevant. Similarly, we reject Duffy's argument that the validity of the Site Availability Report is affected by the fact that Mobile is now out of business. There is no evidence refuting the claim that Mobile was a *bona fide* entity "engaged in the business of acquiring sites for applicants"[16] at the time AA retained Mobile as its agent. Further, there is no evidence, other than Duffy's self-serving statement that Wallace told him to the contrary, to refute the claim that, prior to going out of business, Mobile negotiated with Til Wallace for the site specified in AA's permit application. Finally, there is no evidence to refute AA's statement that "AA paid MRS [Mobile] for [the] agency service, and any rights MRS acquired pursuant to the Site Availability Report were assigned to AA pursuant to this agency arrangement."[17]

12. *Motion to Terminate Proceedings.* Duffy's Motion to Terminate primarily reiterates the argument that AA "never had reasonable assurance of the Wallace site and never had the ability to construct the station." We have addressed this argument *supra.* However, Duffy also submits documentation indicating that on September 17, 1993, Wallace defaulted on his note for the property which was the subject of the Site Availability Report. On March 14, 1994, subsequent to AA's most recent extension request, William R. Tucker ("Tucker") purchased the land. A copy of an August 29, 1994 letter from Tucker to Duffy (attached to Duffy's Motion as Exhibit 2) indicates that "[w]e are not aware of, have not been contacted by anyone regarding, and have no present interest in plans to use the referenced site for purposes of constructing a commercial broadcast antenna."

13. This letter does not, as Duffy asserts, "positively confirm" that "AA never had a site and fraudulently represented that it did." The Site Availability Report was signed by the original owner, Wallace, not by Tucker. A subsequent loss of site does not invalidate an original assurance of availability. However, since Wallace defaulted in September 1993 and notices regarding the default were posted on the property, the documentation Duffy submits indicates that AA failed to exercise due diligence in ascertaining whether the information contained in its original application remained valid when it filed its February 1994 request for extension of time to construct. Further, by not exercising due diligence, AA also failed to meet its obligations under 47 C.F.R. §1.65 (applicants must notify the Commission within 30 days when information in a pending application is no longer substantially accurate and complete; application is "pending" until it is no longer subject to Commission or judicial review).

14. We admonish AA for these failings. Nonetheless, we do not believe they provide a basis either to designate AA for hearing on possible misrepresentation issues or to deny its extension request and cancel its permit. While AA has failed to provide complete and accurate information to the Commission, there is no indication of an intent to deceive, a primary element of both lack of candor and misrepresentation. *See, e.g., WOKO, Inc.,* 329 U.S. 223 (1946); *Fox River Broadcasting,* 93 FCC 2d 127, 129 (1983). Specifically, there is no evidence that AA in fact knew of the ownership change and deliberately withheld the information from the Commission. Indeed, AA's October 13th letter, which was submitted prior to Duffy's submission of evidence that the site originally specified by AA is no longer owned by Wallace, indicates a clear, albeit erroneous, belief on AA's part that it had no obligation to determine continuing site availability and that it therefore had made no effort to contact Wallace.[18] Such disclosure does not appear consistent with an attempt to deceive the Commission concerning the continuing availability of AA's original site. In view of the foregoing, we conclude that no substantial and material question of fact has been presented. *See Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392 (D.C. Cir. 1985).

15. Though we have concluded that, under the circumstances here, AA's failings do not warrant adverse action, we remind all permittees that they must adhere strictly to the Commission's reporting and certification requirements. Thus, regarding site certifications specifically, although permittees do not have an obligation during pending judicial appeals to expend resources in locating a new site if they lose the site specified in their original application, they do have an obligation to confirm the accuracy of information in their original applications before certifying in extension requests that the original information is still accurate. They also have an obligation to report the fact that they have lost their site within 30 days as directed in 47 C.F.R. § 1.65.[19]

16. Accordingly, in light of the above, IT IS ORDERED, That the Petition for Reconsideration filed February 4, 1994 by Bobby Duffy IS DENIED.

17. IT IS FURTHER ORDERED, That the Application for Review filed February 4, 1994 by Bobby Duffy IS DENIED.

18. IT IS FURTHER ORDERED, That the Motion to terminate Proceeding filed October 24, 1994 by Bobby Duffy IS DENIED.

19. IT IS FURTHER ORDERED, That the application for an extension of time to construct Station KWQJ(FM) filed February 22, 1994 by A.A. Radio Partnership (File No. BMPH-940222JD) IS GRANTED and the KWQJ(FM) construction permit IS EXTENDED for six months from the adoption date of this Memorandum Opinion and Order. The permit will expire on January 31, 1996.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[15] AA's response letter at page 3.

[16] *Id.*

[17] *Id.*

[18] Taylor states that "[i]n view of the fact that AA cannot prudently proceed with the construction of its station until the Commission disposes of Bobby Duffy's Petition, AA has not made any attempt to ascertain whether the site specified in its application remains available."

[19] We also reiterate to all licensees that they are required under our rules to notify the Commission of any change in address. *See* 47 C.F.R. §1.5.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

INTER-URBAN BROADCASTING OF CINCINNATI, INC., Debtor-In-Possession, Assignor, — File No. BALH-940524GF

and

BLUE CHIP BROADCAST COMPANY, Assignee

For Assignment of the License of Radio Station WIZF(FM), Erlanger, KY

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 7, 1995; Released: August 16, 1995**

By the Commission:

1. The Commission has under consideration: (1) the Letter of Larry D. Eads, Chief, Audio Services Division, to David Honig, *et al.*, dated November 30, 1994 (hereafter the "*Honig Letter*"), granting the application for assignment of the license of Station WIZF(FM), Erlanger, Kentucky, from Inter-Urban Broadcasting of Cincinnati, Inc., Debtor-in-Possession ("Inter-Urban"), to Blue Chip Broadcast Company ("BCBC"); (2) an Application for Review filed December 30, 1994, by Thomas P. Lewis and James J. Hutchinson ("Lewis and Hutchinson" or "Petitioners");[1] (3) an Opposition to Application for Review filed January 17, 1995 by BCBC; (4) a Reply to Opposition to Application for Review filed February 6, 1995, by Lewis and Hutchinson.

2. *Background.* This case turns in large part on whether the facts in the record support the Petitioners' claim that an entity providing financing for the purchase of WIZF is a real party in interest in the assignee of Station WIZF. Therefore, a brief recitation of the facts is necessary. In 1988, Inter-Urban and two related broadcasting companies also controlled by Lewis and Hutchinson,[2] were advanced $9,400,000 by Barclays Business Credit, Inc. ("Barclays"). After Inter-Urban defaulted on its obligations, Barclays sued the Inter-Urban companies, Lewis, and Hutchinson. On November 27, 1991, a federal district court in New York granted summary judgment in favor of Barclays and ordered the defendants to pay Barclays a total indebtedness of over $13 million. On the same date, Inter-Urban filed a Chapter 11 bankruptcy petition, which automatically stayed the execution of the judgment against the defendants. On February 21, 1992, the Commission granted the involuntary assignment of the WIZF license to Inter-Urban as Debtor-in-Possession. Inter-Urban and Barclays then made several efforts to sell WIZF, including retention of a broker to market the station actively.

3. In December 1992, a venture capital company named Blue Chip Opportunity Fund Limited Partnership ("BCOF") was informed of the availability of WIZF by another media broker, Crisler Capital Company ("Crisler"). BCOF is a limited partnership established in 1991 to create a fund for investment in minority and female-owned emerging companies based in the Cincinnati area. The general partner of BCOF is Blue Chip Venture Company ("BCVC"), which is owned by John Wyant and Z. David Patterson. The limited partners of BCOF include the pension funds of several major Cincinnati-area corporations, such as Cincinnati Bell and Cincinnati Gas and Electric Company, as well as two local banks. BCVC manages BCOF with the aid of a board of advisors composed primarily of prominent African-American business leaders residing in the Cincinnati area. BCVC is also the general partner of Blue Chip Capital Fund Limited Partnership ("BCCF"), a limited partnership that was formed for the purpose of investing in local Cincinnati-based businesses without regard to ownership composition.

4. In January of 1993, Wyant and BCOF's advisory board met with Petitioner James Hutchinson to explore whether BCOF would provide financing to Inter-Urban to allow it to satisfy its debt to Barclays, Inter-Urban's largest creditor. Those discussions were unsuccessful, and BCOF was in fact discouraged by Barclays from dealing with Lewis and Hutchinson, whom Barclays had accused of mismanagement. BCOF decided to continue to explore the possibility of buying WIZF by direct dealings with Barclays. In the spring of 1993, BCOF executed a letter of intent with Barclays to purchase WIZF, and retained Crisler to advise BCOF in the matter. On August 20, 1993, BCOF made an "Irrevocable Offer to Purchase" the assets of WIZF for $4,210,000. However, BCOF has indicated that it was its intent from the outset not to be the primary owner of the station, but rather to invest in a minority-owned company that would actually purchase and control the station. BCOF maintained an active file of potential African-American investors in the Cincinnati area, and began exploring whether any of them might be interested in forming a company to acquire WIZF with BCOF providing assistance in obtaining financing and holding a minority equity position.

5. In November 1993, a member of the BCOF advisory board, Luther Ross Love, Jr., decided to pursue forming a corporation to purchase the station. Mr. Love initiated discussions with BCOF and with Barclays, resulting in the January 5, 1994, assignment of BCOF's "Irrevocable Offer to Purchase" to BCBC, an entity that was formed by Mr. Love and is controlled by him as majority shareholder and President. The proposal for BCBC to purchase the station

[1] Mr. Lewis is the President and 71 percent stockholder of Inter-Urban, and Mr. Hutchinson is the Vice President and 20 percent stockholder of Inter-Urban.

[2] The other entities were Inter-Urban Broadcasting of New Orleans Partnership, licensee of Stations WYLD(AM)/WYLF-FM, New Orleans, LA, and Inter-Urban Broadcasting of St. Louis, Inc., licensee of Station KATZ(AM), St. Louis, MO. These other stations are not involved in the present assignment of license application. WIZF, licensed to Erlanger, Kentucky, serves the nearby Cincinnati market.

was submitted to the Bankruptcy Court with Barclays' concurrence and was approved on April 20, 1994; the Court at the same time rejected an alternative plan for reorganization submitted by Lewis and Hutchinson, that would have left them and Inter-Urban in control of the station.[3] The Bankruptcy Court ordered the Clerk of the Court to sign the assignor's portion of the assignment of license application, which was filed on May 24, 1994.

6. Under the financing structure worked out for the purchase of WIZF, $500,000 in equity common stock, representing 100% of the equity of BCBC, was purchased by Love and his fellow BCBC stockholders.[4] A total of $2,600,000 of senior debt was provided by three banks, Star Bank, Provident Bank, and Fifth Third Bank. BCOF provided $1,000,000 of subordinated debt, and BCCF provided $500,000 of subordinated debt. Neither BCOF, BCCF, nor BCVC purchased any equity in BCBC, nor did any of these entities acquire options or warrants for future equity in BCBC.

7. In their Petition to Deny, Lewis and Hutchinson contended that the WIZF assignment of license application should be designated for hearing to determine whether BCOF, its general partner BCVC, and its sister limited partnership BCCF, are undisclosed real parties in interest in BCBC. Petitioners alleged that BCVC President John Wyant negotiated the sale with Barclays, and that BCBC's principals were "installed" by Wyant to falsely convey the impression that members of the Cincinnati African-American community would be running the station so that the Wyant-controlled companies (which are not minority-owned) will qualify for favored treatment under the Commission's tax certificate and related policies.[5] Lewis and Hutchinson also alleged that financial plans for the acquisition of the station were structured in a way that precludes BCBC from succeeding economically because the Wyant-controlled companies will siphon off revenues through consulting and loan fees, and because the loans provided by BCOF and BCCF impose extremely high interest rates on BCBC that will result in the reversion of the station to BCOF/BCCF within a few years.

8. The *Honig Letter* found that Lewis and Hutchinson had failed to raise a substantial and material question of fact warranting further inquiry, denied the Petition to Deny, and granted the application. The *Honig Letter* noted that the Bankruptcy Court had made extensive factual findings after a full hearing, including oral testimony from Wyant, Love, and others. The Bureau found that the Court's findings directly contradicted Lewis and Hutchinson's real party in interest contentions. The Bureau also concluded that Mr. Love and the other BCBC stockholders were experienced business persons who were actively in control of the company, and that Mr. Love had personally negotiated important terms of the financing and other agreements related to the transaction. The Bureau also found a significant indication that control was held by BCBC's stockholders in the fact that they had paid into escrow their total equity investment of $500,000. Although BCBC was structured essentially as Wyant and BCOF had originally envisioned, and many financing arrangements were initiated by BCOF before Love stepped into his controlling position, the *Honig Letter* found that these facts were insufficient to raise a *prima facie* real party in interest issue. The *Honig Letter* also noted that there was expert testimony at the Bankruptcy Court hearing, accepted by the Court, that the financing terms from BCOF/BCCF were commercially reasonable, and also that the consulting and financing fees were not unreasonable or likely to throw BCBC into financial ruin. The *Honig Letter* thus concluded that the transaction was not structured in a manner that prevented BCBC's operation of WIZF from having a realistic chance of succeeding.

9. In their Application for Review, Lewis and Hutchinson argue that the Bureau failed to consider certain facts which, in their view, demonstrate that Wyant and his companies do control BCBC. Lewis and Hutchinson contend that Wyant "coordinated the preapplication tasks," that he gave BCBC its name, and that he acted as if BCOF was the assignee. Petitioners contend also that Wyant structured the transaction to give his ventures extraordinary post-application influence. Petitioners also argue that the business experience of Mr. Love and the other BCBC shareholders does not indicate that they are in control of the station, but rather demonstrates the sophisticated nature of Wyant's scheme to "disguise his influence" over BCBC. Petitioners, however, no longer argue in their Application for Review, as they had in their Petition to Deny, that the financial terms of the BCOF loans and consulting fees are so onerous as to doom BCBC to financial failure.

10. *Discussion.* We deny Lewis and Hutchinson's Application for Review. Although the Application for Review alleges that review is sought because the grant is in conflict with statute, regulation, case precedent, and Commission policy, in actuality the Application for Review takes issue primarily with the *Honig Letter's* factual conclusions and with the significance of certain facts as indicative of contol. We agree with the factual conclusions reached by the Bureau, and affirm the Bureau's finding that Petitioners failed to present substantial and material questions of fact warranting further inquiry.

11. The test for determining whether a third party is a real party in interest is whether that person has an ownership interest in, or will be in a position to control, actually or potentially, the operation of the station. *See San Joachin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987). In determining whether control has passed from the licensee, the Commission looks, *inter alia*, to whether

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[3] A copy of the Bankruptcy Court's *Memorandum Opinion*, Case No. 91-15053-JAB, U.S. Bankruptcy Court for the Eastern District of Louisiana, was submitted as Attachment A to the Application. The decision of the Bankruptcy Court was affirmed by the United States District Court by *Judgment*, Civ. No. 94-2382 (E.D. La., November 16, 1994).

[4] Mr. Love holds 75% of the common stock of BCBC. Mr. Love is also a Vice President of advertising for Proctor & Gamble Company, and is very active in Cincinnati-area civic matters. The other BCBC stockholders include: Lovie L. Ross (10%), who is the President and co-owner of Penguin Painters, an industrial painting firm; J. Kenneth Blackwell (10%), who is the Treasurer of the State of Ohio and former Mayor of Cincinnati; and Calvin D. Buford (5%), a partner in the largest law firm in Cincinnati and member of several boards of significant civic organizations. All the BCBC stockholders are African-Americans. Lovie L. Ross, like Mr. Love, was also previously a member of the BCOF advisory board, but resigned along with Mr. Love in December 1993 upon joining the BCBC equity ownership group.

[5] We note that the Commission's minority tax certificate policy was terminated by Congressional action in April 1995. *See* Self-Employed Health Insurance Act of 1995, § 2, Pub. L. No. 104-7, 109 Stat. 93 (1995).

another person or entity has the ability to control the finances, personnel, and programming of the station. *See News International, PLC*, 97 FCC 2d 349, 357-58 (1984). In the present case, neither BCOF, BCCF, nor BCVC has any equity ownership interest in BCBC or has any options, warrants, or conversion rights, and they are not entitled to any seats on the BCBC Board of Directors. We concur with the Bureau's finding that BCOF and BCCF are creditors of BCBC, having supplied $1,500,000 in subordinated debt, less than half of the total financing for the station. The predominant amount of the financing, the senior debt of $2,600,000, was supplied by three banks, under terms which the Bankruptcy Court found to be commercially reasonable.

12. At the heart of Lewis and Hutchinson's present argument is their contention that BCOF, with Crisler's assistance, created a structure and financing arrangements for the purchase of WIZF by a hypothetical, but as-yet nonexistent BCBC, and then, "[o]nly after the precise parameters of the deal had been worked out between BCOF and Crisler were efforts made to find African Americans and insert them into the deal." To Petitioners, this scenario, coupled with what they claim are loan terms and consulting fees that are particularly advantageous to BCOF, "show that Mr. Wyant and his companies will derive substantial post-closing benefits from the transaction." We agree with the Bureau that the fact that Mr. Wyant began investigating and setting up the WIZF acquisition before Mr. Love became interested in participating does not, in itself, establish that Wyant and BCOF will control BCBC in the operation of the station. Clearly, BCOF had an interest in promoting the acquisition of WIZF by an entity in which it could appropriately invest or finance, pursuant to BCOF's goal of investing in minority-controlled entrepreneurial efforts. WIZF, which was the preeminent Cincinnati-area station serving the African-American community, was a business which fit the minority-oriented venture capital fund's profile as the type of business deserving of the fund's investment support. Indeed, BCOF's initial exploration of investing in some form in WIZF was at the behest of Lewis and Hutchinson, who, in January 1993, were themselves seeking financial backing from BCOF to help Inter-Urban emerge from bankruptcy status. When the prospect of providing financing to Lewis and Hutchinson faltered, BCOF continued to explore and arrange an acquisition of WIZF and financing for it, with the hope of finding another African-American equity group that would be interested in pursuing the purchase. Accepting these facts, however, which BCBC forthrightly acknowledges, does not establish that BCOF and Wyant are real parties in interest in BCBC.

13. The Commission has held that evidence that others have assisted with pre-filing activities is, standing alone, insufficient to warrant a finding that they are real parties in interest. *See, e.g., Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), *modified in part*, 5 FCC Rcd 5610 (1990). The Commission looks primarily to post-formation activities to determine who will control a newly-formed licensee, unless the post-formation record leaves a fundamental uncertainty about the applicant's control. *See Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5601 (1991), *recon. denied*, FCC 92-449, released Oct. 14, 1992.[6]

14. Here, the post-formation activities engaged in by Luther Ross Love, Jr., show that he has firmly assumed full control of BCBC. There is significant evidence that critical terms of the "deal" that had allegedly been pre-arranged by BCOF were modified at the insistence of Mr. Love in a manner that significantly benefitted BCBC at the expense of BCOF. Most significant is that Mr. Love refused to allow BCOF an equity interest in BCBC, insisting instead that BCOF act as a lender to BCBC only; this was a fundamental change from the original plans that BCOF had developed for the acquisition, in that if the station earns a profit or is later sold for a profit, BCOF does not share in that profit. Mr. Love also revised the consulting arrangement that was contemplated for BCOF, cutting the yearly fee in half from $150,000 to $75,000 and setting a limited term of three years. These facts contradict Petitioners' claim that the final deal "was assembled *exactly* as contemplated in the April 27, 1993 Due Diligence Review which Crisler had prepared for BCOF." Mr. Love also worked on the preparation of the Preliminary Private Placement Memorandum for BCBC that was completed on December 13, 1993, and has supervised the hiring of the Station's new General Manager, in addition to several other corporate activities. Additionally, Mr. Love personally approached a number of prominent African-American business people in the Cincinnati area as potential investors and successfully organized the rest of the equity investment group. Mr. Love contributed $375,000 of his own money, with the other BCBC stockholders investing the remainder of BCBC's $500,000 capitalization. These facts clearly contradict Petitioners' assertions that Love and the other BCBC stockholders have not controlled BCBC and will not likely retain control over the station in the future. On the other hand, both the Application for Review and the underlying Petition to Deny are devoid of any factual support for finding that Wyant, BCVC, BCOF, or BCCF either have exercised control over BCBC in any manner after its formation, or will have any specific power to control the operations of the station to the exclusion of BCBC's stockholders in the future.[7]

15. Rather, as noted above, Lewis and Hutchinson rely in their Application for Review almost exclusively on the history of the transaction prior to the formation of BCBC to establish their contention.[8] We find that even when BCOF's pre-formation activities are considered, they do not, without more, require the conclusion that BCOF will control BCBC in the future. Lewis and Hutchinson have failed to show how these specific pre-formation activities

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[6] The Commission will generally deem an applicant to be formed as of the time that individuals are held out as active or passive investors and organizational documents are filed. *See Magdalene Gunden Partnership*, 6 FCC Rcd 5976, 5977 (1991), *aff'd sub nom., Marin TV Services Partners, Ltd. v. FCC*, 993 F.2d 261 (D.C. Dir. 1993).

[7] We do not agree with the Petitioners that the common use of the words "Blue Chip" in BCOF's and BCBC's names demonstrates that BCBC is under BCOF's control. As Mr. Love explained, Cincinnati is known as the "Blue Chip City," and it is a popular name used by many businesses. But even if BCOF did suggest to Mr. Love the future assignee's corporate name, it is a substantial and unwarranted leap on the record here to conclude from this that BCOF will control the operation of the Station in the future.

[8] In seeking review, Petitioners no longer claim (as they had in their Petition to Deny) that the terms of the financing and consulting arrangements between BCBC and BCOF/BCCF are

demonstrate that BCOF will be in a position to exercise control over the finances, personnel, and programming of WIZF. *See News International, supra,* 97 FCC 2d 349, 357-58. For these reasons, we reject Lewis and Hutchinson's allegations that BCOF, BCCF, or BCVC are real parties in interest in BCBC.

16. Accordingly, IT IS ORDERED that the Application for Review filed December 30, 1994, by Thomas P. Lewis and James J. Hutchinson IS DENIED; that the grant of the application for assignment of the license of Station WIZF(FM), Erlanger, Kentucky, from Inter-Urban Broadcasting of Cincinnati, Inc., Debtor-in-Possession, to Blue Chip Broadcasting Company IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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so onerous that they will cause BCBC to fail, ultimately resulting in the conveyance of the station to BCOF/BCCF. As noted above, the *Honig Letter* recognized that the Bankruptcy Court had relied on testimony at the Bankruptcy Court hearing that the financing terms from BCOF/BCCF were commercially reasonable, and also that the consulting and financing fees were not unreasonable or likely to throw BCBC into financial ruin. However, Petitioners do now argue generally that "[r]egardless of [the BCOF financing terms and consulting arrangements'] commercial reasonableness or lack of same, Mr. Wyant and his companies will derive substantial post-closing benefits from the transaction." Such post-closing benefits for BCOF, if anything, demonstrate a valid and reasonable justification for BCOF's involvement in arranging the transaction, without carrying any further implication. Similarly, Lewis and Hutchinson no longer persist in maintaining, as had been argued in their Petition to Deny, that BCBC has an undisclosed agreement or intention to sell the station in 1998. Nor do Petitioners any longer contend that the consulting agreement between BCOF and BCBC -- which gave BCBC the right to reject any and all advice rendered by BCOF -- gives BCOF impermissible power to control BCBC. Petitioners' abandonment of these arguments (which were never supported by record evidence) leaves the Application for Review devoid of any description of how Wyant or BCOF would be in a position to actually or potentially control the operation of the station *in the future*.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

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| Multimedia WMAZ, Inc. | CSR-4210-A |
| Macon, Georgia | GA0/142 |

For Modification of station
WMAZ-TV's ADI

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 3, 1995; Released: August 17, 1995**

By the Deputy Chief, Cable Services Bureau:

**INTRODUCTION**

1. In the captioned proceeding, Multimedia WMAZ, Inc., licensee of station WMAZ-TV (CBS, Channel 13), Macon, Georgia (hereinafter "WMAZ-TV") has requested the Commission to include the community of Soperton in Treutlen County, Georgia within the Macon, Georgia "area of dominant influence" ("ADI") for the purpose of obtaining signal carriage rights on the cable system serving that community. AFLAC Broadcast Partners ("AFLAC"), licensee of station WTOC-TV (CBS, Channel 11), Savannah, Georgia, filed an opposition to the petition, to which WMAZ replied.

**BACKGROUND**

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[2] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 4 provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as --
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[5] Communications Act of 1934, as amended, §614(h)(1)(C)(ii), 47 U.S.C. §534(h)(l)(C)(ii).

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in its *Report and Order in MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.,* when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

## MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition, WMAZ-TV asks the Commission to add Soperton, Georgia to the Macon, Georgia ADI so that WMAZ-TV may assert must carry rights on the cable system serving that community. WMAZ-TV explains that it began operating in September 1953 and is affiliated with the CBS network. Although Treutlen County is assigned to the Savannah, Georgia ADI, WMAZ-TV states that it has historically been considered the local CBS affiliate by viewers in Treutlen County since it signed on the air.

9. In support of its request, WMAZ-TV states that it has been carried on the Scripps Howard cable system in Treutlen County for almost 17 years. With respect to coverage and local service, WMAZ-TV states that it has a commitment to local programming and broadcasts some 42 1/2 hours of news, information, and public affairs programming each week -- over half of it local. The station includes a partial news log reflecting the kind of local issues (sports, crimes, and accidents) it covers in its newscasts. With regard to other stations serving the area, WMAZ-TV states that Treutlen County also receives coverage from stations WTOC-TV, WJCL (ABC, Channel 22), WSAV (NBC, Channel 3), WVAN (ETV, Channel 9), all Savannah, Georgia; WJBF (ABC, Channel 6) and WRDW-TV (CBS, Channel 12), both Augusta, Georgia; WGXA (ABC, Channel 24) and WMGT (NBC, Channel 41), both Macon, Georgia; WDCO (ETV, Channel 15), Cochran, Georgia; and WTGS (Ind., Channel 28), Hardeville, South Carolina. As for local viewing patterns, according to 1993 Nielsen figures, WMAZ-TV has a 42 share in Treutlen County for the 7:00 am-1:00 am time slot. WMAZ-TV adds that it "outperforms" all Savannah stations combined. In addition, by more than 3 to 1, viewers prefer WMAZ-TV to WTOC-TV, the CBS affiliate in Savannah. Finally, the station submits that residents and community leaders have expressed their strong desire to be served as part of the Macon ADI to ensure continued carriage of WMAZ-TV on the cable system serving the community.

10. AFLAC, in its opposition, argues that WMAZ-TV has failed to carry its burden under the Commission's rules and its petition should be denied. AFLAC first questions

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[6] H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] 8 FCC Rcd at 2977 n.139. Viewership data cited herein is from Arbitron, *Television County Coverage* reports. This data is county data, rather than community-specific data. However, absent evidence that such data is not fairly reflective of viewing in the actual communities in question, we accept such data as probative in cases of this type.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.

whether WMAZ-TV has asked not only that Soperton be added to the Macon ADI, but if it has also implicitly requested that Soperton be deleted from the Savannah ADI, which is WTOC-TV's home ADI. If deletion is indeed requested, AFLAC argues that WMAZ-TV has not provided any support for such a modification. AFLAC also asserts that WMAZ-TV has not demonstrated the need for Commission intervention in order to preserve its carriage on the relevant cable system because there is no indication that WMAZ-TV will be dropped if the requested relief is not granted. Moreover, WTOC-TV has delivered local news and informational programming to the community for many years and the grant of special relief is not necessary to ensure local service to the community. According to AFLAC, WTOC-TV provides almost 21 hours per week of locally originated news, weather, and informational programming and its coverage of the community is comparable to that of WMAZ-TV. AFLAC also argues that it has significant viewership levels in certain dayparts, such as late-night fringe, that ties with, or outperforms, WMAZ-TV. AFLAC concludes by stating that WMAZ-TV is not unique in providing local news and informational programming to residents of Treutlen County and the community.

11. In its reply, WMAZ-TV first clarifies that it seeks to have its current ADI modified to include Soperton in Macon, and not necessarily to exclude that same community from the Savannah ADI. With regard to local service, WMAZ-TV argues that while WTOC-TV does appear to provide some service to Soperton through its local news, an in-depth review reveals that coverage amounts to only one story every 5 1/2 months. WMAZ-TV notes that in contrast, it provides more coverage of matters of interest to the residents in the cable community. As for local viewing patterns, WMAZ-TV asserts that, when viewed as a whole, it "overwhelmingly" outperforms WTOC-TV, and that WTOC-TV has "cherry-picked" the most favorable data and has suggested that a few selected day-parts reflect the entire viewing pattern of the residents of the cable community.

## ANALYSIS AND DECISION

12. WMAZ-TV has provided sufficient evidence to justify its market modification request and it will accordingly be granted. Turning to the factors specified in the 1992 Cable Act, we find that WMAZ-TV has met three of the four statutory elements with the historical carriage requirement and viewership showing being particularly notable. As WMAZ-TV's pleading reveals, the station has been continuously carried on the Scripps Howard cable system for nearly 17 years. The fact that Scripps-Howard has continuously carried WMAZ-TV demonstrates that the cable operator and its subscribers value the station as the predominant CBS network affiliate providing service to the community at issue and that the community is logicaly part of its market.

13. With respect to coverage and local service to Soperton, we believe that WMAZ-TV has shown that it provides sufficient local news coverage and other community-specific stories.[11] The viewing pattern data in cable and non-cable households also demonstrates that WMAZ-TV has a strong marketplace presence in Soperton. The station has a substantial net weekly circulation and share in cable and non-cable households in Treutlen County. In 1993, for example, WMAZ-TV's viewing share in Treutlen County was 22 and its net weekly circulation was 32. This compares with WTOC-TV's share of 15 and net weekly circulation of 47.[12]

14. With respect to the third factor, we note that WTOC-TV indicates that it provides coverage of, and programming to, the community and county in question. However, we do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. We view WMAZ-TV's showing on each of the other factors is sufficient, and even absent enhancement under the third criterion, grant of its request is warranted.

## ORDER

15. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed on February 8, 1994 by Multimedia WMAZ, Inc. IS GRANTED. Multimedia WMAZ, Inc. shall notify Scripps Howard in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Scripps Howard shall come into compliance with the applicable rules within 60 days of such notification.

16. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] While we note that the station's Grade B contour does not cover Soperton, neither does that of WTOC-TV.

[12] Arbitron, *Television County Coverage: Georgia* (Standard/Fringe), 1993. These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Multimedia WMAZ, Inc. CSR-4182-A
Macon, Georgia

For Modification of Station
WMAZ-TV's ADI

## MEMORANDUM OPINION AND ORDER

**Adopted: August 3, 1995; Released: August 17, 1995**

By the Deputy Chief, Cable Services Bureau:

## INTRODUCTION

1. In the captioned proceeding, Multimedia WMAZ, Inc., licensee of station WMAZ-TV (CBS, Channel 13), Macon, Georgia (hereinafter "WMAZ-TV") has requested the Commission to include the communities of Marshallville, Montezuma, Oglethorpe, and all unincorporated areas of Macon County, Georgia within the Macon, Georgia "area of dominant influence" ("ADI") for the purpose of obtaining signal carriage rights on the cable systems serving those communities. AFLAC Broadcast Partners, licensee of station WTVM (ABC, Channel 9), Columbus, Georgia ("WTVM"), and Avant Development Corporation, licensee of station WRBL (CBS, Channel 3), Columbus, Georgia ("WRBL"), filed oppositions to the petition, to which WMAZ-TV filed informal comments.[1]

## BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 4 provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as --
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] WMAZ-TV notes that it inadvertently failed to timely respond to the oppositions within the applicable period. The station states that should the Commission not accept WMAZ's reply in the formal pleading cycle, it should accept the reply as informal comments in response to WRBL and WTVM's oppositions. Since the pleading was in fact late-filed, we shall consider it as informal comments and not as a reply.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] Communications Act of 1934, as amended, §614(h)(1)(C)(ii), 47 U.S.C. §534(h)(l)(C)(ii).

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in its *Report and Order in MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.,* when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

## MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition, WMAZ-TV asks the Commission to add Marshallville, Montezuma, Oglethorpe, and all unincorporated areas of Macon County, Georgia to the Macon, Georgia ADI so that WMAZ-TV may assert must carry rights on the cable systems serving those communities. WMAZ-TV explains that it began operating in September 1953 and is affiliated with the CBS network. WMAZ-TV submits that because it has been carried for almost 25 years on the cable systems in the communities, deletion from the systems would cause significant disruption to the viewing habits of cable subscribers in the communities.

9. In support of its request, WMAZ-TV states that it has been carried on the Scripps Howard cable system in Macon County since 1969. It also asserts that the other cable systems in the communities have historically carried its signal. With respect to coverage and local service, WMAZ-TV states that more than one-half of Macon County is within its Grade A contour and its Grade B contour wholly encompasses the cable communities. WMAZ-TV also asserts that it has a commitment to local programming and broadcasts some 42 1/2 hours of news, information, and public affairs programming each week – over half of it devoted to coverage of local news. The station includes a news log reflecting the kind of local issues (sports, crimes, and accidents) it covers in its newscasts. With regard to other stations serving the area, WMAZ-TV states that Macon County also receives coverage from Television Broadcast Stations WLTZ (NBC, Channel 38), WRBL, and WTVM, all Columbus, Georgia; WALB (NBC, Channel 10), and WFXL (Ind., Channel 31) Albany, Georgia; WTGS (Ind., Channel 28), Hardeeville, South Carolina; and WGXA (ABC, Channel 24) and WMGT (NBC, Channel 41), both Macon, Georgia. As for local viewing patterns, WMAZ-TV asserts that although Macon County is assigned to the Columbus, Georgia ADI, it is still considered the local CBS affiliate by viewers in the communities because of its long history of service. According to 1993 Nielsen figures, WMAZ-TV has a 36 cable share and a 32 non-cable share in Macon County. WMAZ-TV adds that it

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[7] H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

[8] 8 FCC Rcd at 2977 (emphasis in original).

[9] 8 FCC Rcd at 2977 n.139. Viewership data cited herein is from Arbitron, *Television County Coverage* reports. This data is county data, rather than community-specific data. However, absent evidence that such data is not fairly reflective of viewing in the actual communities in question, we accept such data as probative in cases of this type.

[10] 47 C.F.R. §76.59.

[11] 8 FCC Rcd at 2981.

"outperforms" all Columbus stations combined. Finally, the station submits that residents and community leaders have expressed their strong desire to be served as part of the Macon ADI to ensure continued carriage of WMAZ-TV on the cable systems serving the communities.

10. In its opposition, WRBL submits that the petition should be denied because WMAZ-TV has failed to make the requisite showing under the 1992 Cable Act and the Commission's implementing rules. WRBL first argues that WMAZ-TV fails to demonstrate that it has been historically carried, in terms of years, on Ideal Cable TV and Peach State Cable, the two other systems serving the communities. Moreover, the petition fails to indicate whether other Macon ADI stations have been carried by the cable operators serving Macon County. As for WMAZ-TV's local service, WRBL argues that the programming demonstrations are unsubstantiated and do not specifically indicate how they are tied to the communities to be added to the Macon ADI. With regard to other stations in the market providing relevant programming, WRBL asserts that it airs coverage of special news events, weather reports, and local sports results. On a different note, WRBL questions why special relief is necessary here because there is no market anomaly that needs to be corrected as WMAZ-TV's is evidently successful in the Columbus, Georgia television marketplace. WRBL hypothecates that the petition has the broader purpose of re-assigning the entire County of Macon into the Macon ADI. If this is the case, WRBL notes that there is no support for such a modification.

11. WTVM, in its opposition, also argues that WMAZ-TV has failed to carry its burden under the Commission's rules and its petition should be denied.[12] According to WTVM, WMAZ-TV fails to provide any history with respect to its carriage on two of the three cable systems serving the communities. WTVM also submits that it has provided local service to the communities for over 30 years and has been historically carried on all of the relevant cable systems in the County. In addition, WTVM produces and airs extensive local news, weather, and sports programming. WTVM also asserts that it has significant viewership levels in both cable and non-cable homes in Macon County. WTVM similarly questions whether WMAZ-TV petition is justified since WMAZ-TV is now carried on the Macon County cable systems. WTVM notes that if WMAZ-TV is indeed asking for the Macon County communities to be deleted from the Columbus ADI, such a proposal must be denied because the evidence does not support such a result.

12. In its informal comments, WMAZ-TV first clarifies that Peach State Cable has carried its signal since 1968 and Ideal Cable TV has carried its signal since 1984. With regard to local service, WMAZ-TV argues that it does specifically serve the communities through its half-hour local affairs program, "Close-Up", as well as through its editorials, numerous news stories, and high school sports coverage. WMAZ-TV also argues that its petition is necessary because carriage on the Macon County cable systems is not mandatory under the 1992 Cable Act and the Commission's rules; an ADI redesignation would prevent the station from being deleted in the relevant cable communities and eliminate potential disruptions to cable viewers, most of whom prefer WMAZ-TV over other stations.

## ANALYSIS AND DECISION

13. WMAZ-TV has provided sufficient evidence to justify its market modification request and it will accordingly be granted. Turning to the factors specified in the 1992 Cable Act, we find that WMAZ-TV has met three of the four statutory elements with the historical carriage requirement and viewership showing being particularly notable. As WMAZ-TV's pleading reveals, the station has been continuously carried on the Scripps Howard and Peach State cable systems for nearly 25 years, and on the Ideal Cable TV system for nearly 10 years. The fact that the cable operators have continuously carried WMAZ-TV demonstrates that they and their subscribers value the station as the predominant CBS network affiliate providing service to the community at issue and that the areas in question are logically part of its market.

14. The viewing pattern data in cable and non-cable households also demonstrates that WMAZ-TV has a strong marketplace presence in the cable communities. The station has a substantial net weekly circulation and share in cable and non-cable households in Macon County. In 1993, for example, WMAZ-TV's viewing share in Macon County was 27 and its net weekly circulation was 60, which is significantly greater than the viewership garnered by WRBL, the Columbus CBS affiliate.[13] With respect to coverage and local service to the cable communities, we believe that WMAZ-TV has shown that it provides sufficient local news coverage and other community-specific human interest stories. Moreover, the station's Grade B contour covers all the relevant cable communities.[14]

15. With respect to the third factor, we note that WTVM and WRBL indicate that they provides coverage of, and programming to, the communities and county in question. However, we do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. We view WMAZ-TV's showing on each of the other factors is sufficient, and even absent enhancement under the third criterion, grant of its request is warranted.

## ORDER

16. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed on January 5, 1994 by Multimedia WMAZ-TV, Inc. IS GRANTED.

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[12] WTVM notes that it incorporates by reference the arguments raised by WRBL in its opposition.

[13] Arbitron, *Television County Coverage: Georgia* (Standard/Fringe), 1993. These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

[14] The Commission has held that Grade B coverage demonstrates service. *See* 8 FCC Rcd at 2981.

Multimedia WMAZ-TV, Inc. shall notify Scripps Howard, Peach State Cable, and Ideal Cable TV in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Scripps Howard, Peach State Cable, and Ideal Cable TV shall come into compliance with the applicable rules within 60 days of such notification.

17. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Petition of Greater Philadelphia Cablevision, Inc. — CSR-4446-A

For Modification of the ADI of Station WWAC, Atlantic City, NJ

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 31, 1995; Released: August 17, 1995**

By the Cable Services Bureau:

**INTRODUCTION**

1. Before the Commission is a petition filed by Greater Philadelphia Cablevision, Inc. ("Greater Media" or "operator") seeking to modify the Philadelphia, PA "area of dominant influence" ("ADI") and to exclude that area of the City of Philadelphia it serves from the television market of station WWAC (Ch. 53, Atlantic City, NJ) for purposes of the cable television mandatory broadcast signal carriage rules. This petition is opposed by Cellular Phone Centers, Inc., licensee of WWAC.

**BACKGROUND**

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[5]

5. As for deletions of communities from a station's ADI, the legislative history of this provision indicates that:

> The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[6]

6. The Commission provided the following guidance in the *Report and Order* to aid decisionmaking in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

7. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

8. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

## MARKET FACTS AND ARGUMENTS OF THE PARTIES

9. In its petition, Greater Media requests that the Commission modify WWAC's must carry market to exclude its Philadelphia cable system. Greater Media states that although the Philadelphia ADI technically encompasses both WWAC and the system, affording WWAC must carry rights in Philadelphia would be counter to the localism goals underlying the signal carriage regime. In addition, mandatory carriage of the station will force the operator to delete an existing program service. Greater Media also notes that WWAC requested carriage on the system by letter dated August 24, 1994 and that it is seeking modification due to the "anomalous circumstances surrounding the station's request."

10. Greater Media explains that its system serves approximately 79,000 subscribers in the City of Philadelphia. The system's channel capacity currently operates at 78 channels. To support its petition, Greater Media asserts that WWAC fails to satisfy any of the four market factors set forth in the 1992 Cable Act and the Commission's rules. With regard to the historical carriage factor, the operator

[5] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] *Id.* and n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.

asserts that WWAC has never been carried on the systems nor was it carried on any other cable system in the Philadelphia area prior to the reimposition of must carry. Petitioner also alleges that the station fails the local service element of the market modification test. First, WWAC is licensed to Atlantic City, New Jersey, more than 50 miles distant from the Philadelphia system. In addition, the system is well beyond WWAC's Grade B contour and no detectible signal can be received at the Philadelphia principal headend. According to the operator, WWAC also broadcasts home shopping programming that lacks a local focus; Greater Media estimates that over 75% of the station's broadcast consists of home shopping such as "Value Vision" and "Shop at Home." Greater Media estimates that the "local" programming the station does air amounts to no more than 5 hours of its broadcasting week.

11. Referring to the third factor, Greater Media states that several area stations provide extensive local programming throughout each day. The system carries a total of 13 local broadcast stations, including 9 commercial stations and 4 non-commercial stations. The system also carries at least 7 local access channels which provide programming by and for the system communities. The operator also asserts that it supplements its channel line-up with over 30 hours of locally produced community interest shows and that it inserts a daily 5 minute segment of local news onto the CNN Headline News Channel. Moreover, the system already carries 2 full time home shopping networks, QVC and WHSP. With regard to viewership, the operator alleges that WWAC has insignificant viewing and was unable to identify any commercial ratings for the station within its service area.

12. In opposition, WWAC asserts that Greater Media's petition should be denied because carriage of the station on the system serves the "substantial government interest in promoting the continued availability of... free television programming..." WWAC notes that New Jersey broadcasters have a special responsibility to the residents in the state and that the station's public service would be diminished as a result of its lack of access on the Philadelphia cable system. WWAC argues the problem would be exacerbated if Philadelphia is removed from its ADI because it already has no access to New York ADI cable communities even though Atlantic City is near the border of that market. Granting the deletion request would also re-create the competitive imbalance between WWAC and the system because it would destroy the station's ability to compete for Philadelphia viewers along with the station's ability to enhance its local news and public affairs broadcasting.

13. As for the four market modification factors, WWAC submits that historical carriage on cable systems in the community has little significance here because lack of carriage in deletion cases is "more likely a reflection of the cable system's ability to flex its past anti-competitive muscle, rather than an indication that the station should not be entitled to carriage." With regard to the local service factor, WWAC notes that its signal is presently unavailable off-the-air in Philadelphia for two reasons. First, the FAA will not approve construction of a tower of sufficient height to provide service to Philadelphia. Second, at permissible tower heights, the necessary effective radiated power to reach Philadelphia would pose risks of human exposure to radio frequency radiation. WWAC therefore asserts that the only method it can provide service to the Philadelphia market is via cable and proposes to provide the station's signal to the system via a fiber path to be constructed at its expense. As for local programming, the station states that because of the tower limitations, it has confined community programming to Atlantic City and nearby communities, areas where the signal is presently available. The station adds that the requirement that it air programming geared toward Philadelphia residents in the absence of signal availability is not logical or fair. The station also argues that Greater Media's lack of carriage has impeded its ability to finance further local programming efforts. Moreover, WWAC asserts that there are common ties between Atlantic City and Philadelphia, demonstrating a unified market, as evidenced by the wide circulation of the *Philadelphia Inquirer* in Atlantic City and the existence of the Atlantic City expressway which directly connects the two points. Finally, WWAC claims that Greater Media's carriage of two other home shopping stations implicitly shows its anti-competitive tendencies.

## ANALYSIS AND DECISION

14. We will grant Greater Media's request. Based on the geography and the statutory factors, we believe that Philadelphia is sufficiently removed from WWAC that it ought not be deemed part of the station's market for mandatory carriage purposes.[11] The evidence before us, which we believe has not been sufficiently disputed by WWAC, distinguishes Philadelphia from Atlantic City and persuades us that the action requested would "better effectuate purposes" of Section 614 of the 1992 Cable Act.

15. At the outset, the evidence suggests that WWAC does not provide local service to the communities in question. WWAC's does not place either a Grade A or Grade B contour over the cable communities.[12] We note that this lack of coverage is due to the station's technical limitations. However, we believe Congress enacted Section 614(h) with a deletion provision so that market anomalies such as this one could be properly rectified through the special relief process. Moreover, the station admits that it does not carry programming designed for cable viewers in the City of Philadelphia. WWAC also has no reported audience in Philadelphia County where the cable community is located and it has no history of cable carriage. Moreover, Atlantic City, NJ, WWAC's city of license, is about 55 miles away from Philadelphia. The distance and technological impediments involved attenuates the local ties the station might have to the cable communities and helps explain why the station's viewership is too low to be reported.

16. We also believe that Greater Media's carriage of other local television stations provides support for the action requested. We recognize that Congress did not intend the third statutory criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. However, we believe this case is exemplary in that there are several

[11] H.R. Rep. 102-628, at 97-98.

[12] We have held that the local service requirement is satisfied if the station's Grade B contour covers the community. *See* 8 FCC Rcd at 2981.

television stations, such as KYW and WCAU, licensed within and around Philadelphia which have a closer nexus to the City and provide more focused local programming than WWAC. These market facts, coupled with the distance between the cable community and WWAC, supports Greater Media's argument under the third factor.

17. Greater Media also demonstrates that WWAC has no historical carriage on the cable system in question and has no audience in the county in which the cable system is located. Because WWAC is both a relatively new station, returning to the air in 1988,[13] and one with a specialized format, these facts are not proper indicators, in and of themselves, of the relationship between the cable communities and the market of the television station nor should their absence permit a cable operator to undermine the objectives of the mandatory carriage requirement.[14] Here, however, we conclude that the lack of historical carriage and the dearth of audience is of evidential significance when linked with other information regarding the market, the station's technical configuration, and the particular geography involved.

18. This is not a situation where the carriage pattern suggests that a station is logically part of the market for carriage purposes but has not been carried for competitive or content reasons. Nor do we believe that the operator has impermissibly singled out WWAC from among other similarly situated stations as the sole station it has declined to carry. We also note that no other Philadelphia area cable system is carrying WWAC's signal. In these circumstances, we cannot discount WWAC's lack of carriage and audience as indicators of the scope of its market area.

19. Given these facts, the operator's deletion petition appears to be a legitimate request to redraw ADI boundaries to make them congruous with market realities.

## ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(h), and Section 76.59 of the Commission's Rules, 47 C.F.R. § 76.59, that the "Petition for Special Relief" (CSR-4446-A) filed January 3, 1994, by Greater Philadelphia Cablevision, Inc. IS GRANTED.

21. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[13] WWAC began operation on July 29, 1981. It went black in July 1982. The Commission granted assignment of the license to the current owner in May, 1991.

[14] *See, e.g., Time Warner Cable of Houston, Texas* (CSR-4108-A) (adopted: June 8, 1995).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

INTERNATIONAL TELECOMMUNICATIONS CORPORATION

Application for authority to transfer control of International Telecommunications Group, Ltd. — File No. I-T-C-95-273(TC)

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: August 9, 1995; Released: August 17, 1995**

By the Chief, Telecommunications Division:

1. International Telecommunications Corporation (ITC), pursuant to Section 214 of the Communications Act of 1934, as amended, submitted the above-captioned application requesting authority to transfer control of its parent corporation, International Telecommunications Group, Ltd. (ITG)[1] from Charles M. Piluso, its curent majority shareholder and Chief Executive Officer, to the shareholders of ITG generally. The application was placed on public notice and no comments were received. On August 1, 1995, ITG amended its application to update ownership information.

2. ITC, a Delaware corporation, is a certified domestic and international communications carrier providing service primarily to other common carriers and business users.[2] By an amendment to an existing Shareholders' Agreement dated March 10, 1995, Charles M. Piluso and Richard Rebetti agreed to share control of ITC and ITG with its existing shareholders including those investors who purchased or may in the future purchase shares of Series A Convertible Preferred Stock of ITG.[3] ITC states that it is common, in communications companies, for control to shift over from a single financing individual to a group of shareholders willing to commit capital to fund the carrier's growth. In the instant case, the shareholders have made clear their intention to become involved in control of ITC and its compliance with FCC requirements.

3. ITC states that grant of its application will serve the public interest by permitting it to address the growing needs of its customers and to expand its international telecommunications network with the infusion of equity capital. ITC does not propose any changes in its current Section 214 authorizations or seek any additional authority. It is not transferring any of its Section 214 authorizations either.

4. In view of the foregoing, we conclude that grant of the instant application will serve the public interest, convenience and necessity.

5. Accordingly, IT IS ORDERED that the application of International Telecommunications Corporation, File No. I-T-C-95-273(TC) IS GRANTED, and ITC is authorized to transfer control of its parent corporation, International Telecommunications Group, LTD. from Charles M. Piluso to the shareholders of ITG generally pursuant to the terms of the amended Shareholders Agreement.

6. IT IS FURTHER ORDERED that all terms and conditions of any Commission orders granting authority to ITC to provide common carrier services remain the same.

7. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

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[1] In addition to ITC, ITG also holds a 50% stock interest in International Telecommunications Europe, Ltd. and a 50% stock interest in Intelco Russia Corporation.

[2] See DA-93-1491, released December 29, 1993 (File No. I-T-C-93-332), DA--92-421, released April 10, 1992 (File No. I-T-C-92-072), DA-92-792, released June 25, 1992 (File No. I-T-C-92-105), DA-92-700, released June 8, 1992 (File No. I-T-C-92-112), DA-92-1317, released October 6, 1992 (File No. I-T-C-92-175).

[3] The preferred stock may be converted into ITG common stock at any time. Currently, RSL Communications, Inc. (RSL), a British Virgin Islands corporation without foreign carrier affiliations, owns all of this preferred stock. Assuming conversion, RSL would own 35% of ITG's common stock.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TLC PRODUCTIONS, INC.

Application for authority to transfer control of an authorized international carrier. File No. I-T-C-95-369(TC)

**MEMORANDUM OPINION, ORDER AND AUTHORIZATION**

**Adopted: August 9, 1995; Released: August 17, 1995**

By the Chief, Telecommunications Division:

1. TLC Productions, Inc. (TLC) and National Wireless Holdings, Inc. (NWH), pursuant to Section 214 of the Communications Act of 1934, as amended, submitted the above-captioned application requesting authority to transfer control of TLC from E. Vernon Oliver to NWH. The application was placed on public notice on June 9, 1995. No comments were received.

2. TLC, a Florida corporation, is authorized, pursuant to Section 214 of the Communications Act of 1934, as amended, to provide facilities-based international and transborder services between the United States and various overseas points via INTELSAT, various separate satellite systems, and U.S. domestic satellites.[1] TLC is wholly-owned by E. Vernon Oliver, a U.S. citizen, and is not affiliated with any foreign telecommunications entity. NWH, a Delaware corporation, is a holder of multiple authorizations to provide multipoint distribution service (MDS). NWH is not affiliated with any U.S. international common carrier or any foreign telecommunications entity. II. Mr. Oliver, TLC and NWH have determined that they will realize significant economic and management efficiencies by establishing TLC as a wholly-owned subsidiary of NWH. Mr. Oliver and NWH have negotiated a Stock Purchase Agreement whereby NWH intends to acquire all of the outstanding stock of TLC. The applicants state that TLC will continue to provide high quality, affordable services pursuant to its tariff on file with the Commission. In addition, they state that the proposed transaction will change only the underlying ownership of TLC, and will not cause confusion or inconvenience to its customers.

4. In view of the foregoing, we conclude that grant of the instant application will serve the public interest, convenience and necessity.

5. Accordingly, IT IS ORDERED that the application of TLC IS GRANTED, and E. Vernon Oliver and TLC are authorized to transfer control of TLC from E. Vernon Oliver to NWH.

6. IT IS FURTHER ORDERED that all terms and conditions of any Commission orders granting authority to TLC to provide common carrier services remain the same.

7. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] *See TLC Productions, Inc. d/b/a North Miami International Teleport*, DA-93-907, released July 26, 1993 (File No. I-T-C-93-061), DA-94-722, released July 11, 1994 (File No. I-T-C-94-210) and DA-94-1065, Released October 5, 1994 (File No. I-T-C-94-318.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-95-382

Application for authority to acquire and operate facilities for service between the United States and Zaire.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: August 9, 1995; Released: August 17, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and Zaire by Sprint Communications Company L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-382 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate a 1 Mbps IDR satellite circuit between Sprint's Franklin, New Jersey earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Zaire, furnished by Sprint's correspondent;

b. own and operate facilities in the Franklin earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate connecting facilities between the Franklin earth station and Sprint's New York City operating center;

d. use said facilities to provide Sprint's regularly authorized services between the United States and Zaire.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Zaire -- that is, private lines which originate in the United States and terminate in Zaire or which originate in Zaire and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Zaire end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Zaire affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**August 9, 1995**

**Released: August 17, 1995**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Rollins Telecasting, Inc. F1800E
Licensee, WPTZ(TV)
One Galleria Tower, Suite 1500
13355 Noel Road
Dallas, TX 75240

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of seventeen thousand five hundred dollars ($17,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the amount of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Accordingly, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On February 1, 1994, you filed an application for renewal of license (FCC Form 303-S) for Station WPTZ(TV), North Pole, NY (File No. BRCT-940201LJ). In a supplement you indicate that during the preceding license term WPTZ(TV) did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 3 to your application you state that between February 3 and March 31, 1992, WPTZ(TV) exceeded the commercial limits on children's programming on 77 occasions. Of these 77 commercial overages, 37 were 30 seconds in duration; two were 40 seconds in duration; 34 were one minute in duration; three were one and one-half minutes in duration; and one was two minutes in duration. You state that these overages occurred due to a misunderstanding of the rules on the part of the station's traffic manager; that upon discovery of the overages the station established additional monitoring procedures to prevent recurrence; and that there have been no additional overages since institution of the new procedures.

WPTZ(TV)'s record during the last license term of exceeding the Commission's commercial limits on children's television programming on 77 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Rollins Telecasting, Inc., is hereby advised of its apparent liability for forfeiture in the amount of seventeen thousand five hundred dollars ($17,500) for its apparent violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993). A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*"Policy Statement/Assessing Forfeitures"*) , which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (1995); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (1995).

The 77 occasions on which WPTZ(TV) exceeded the hourly limits on commercial matter during children's programming is a very high number of violations. Moreover, although 39 of the overages were less than one minute in duration, 38 were a minute or greater in duration. Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. In addition, when the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the

additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that would have prevented Station WPTZ(TV) from complying with the children's television commercial limitations during the last license period. The only explanation you have provided for the overages, human error, does not justify or excuse the violations. Finally, the fact that WPTZ(TV) may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $17,500.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith or that the violations reflect a deliberate disregard for Commission requirements. Rather, these violations reflect the licensee's failure to institute procedures sufficient to ensure compliance with the children's television commercial limitations. Accordingly, we do not believe that the violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station WPTZ(TV) would serve the public interest, convenience and necessity. Therefore, the license renewal application of Rollins Telecasting, Inc., File No. BRCT-940201LJ, for Station WPTZ(TV), North Pole, NY, IS HEREBY GRANTED for a term to end on June 1, 1999.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure

cc: Tom W. Davidson, Esq.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**August 9, 1995**

**Released: August 17, 1995**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Mt. Mansfield Television, Inc. F1800E
Licensee, WCAX-TV
P.O. Box 608
Burlington, VT 05403

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars ($10,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the amount of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Accordingly, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On December 1, 1993, you filed an application for renewal of license (FCC Form 303-S) for Station WCAX-TV, Burlington, VT (File No. BRCT-931201LN). In a supplement you indicate that during the preceding license term WCAX-TV did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 3 to your application you state that between January 4 and April 12, 1992, WCAX-TV exceeded the commercial limits on children's programming on 30 occasions. Of these 30 commercial overages, five were 30 seconds in duration; four were one minute in duration; five were one and one-half minutes in duration; two were two minutes in duration; five were three minutes in duration; one was three and one-half minutes in duration; two were four minutes in duration; and six were four and one-half minutes in duration. You state that all of these commercial overages occurred during broadcasts of one particular syndicated program because of a computer error that failed to count "barter" commercial advertisements included in the program; that the problem was discovered and corrected in the course of the station's first quarterly audit of its children's programs; and that there have been no additional overages since April 12, 1992.

WCAX-TV's record during the last license term of exceeding the Commission's commercial limits on children's television programming on 30 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Mt. Mansfield Television, Inc., is hereby advised of its apparent liability for forfeiture in the amount of ten thousand dollars ($10,000) for its apparent violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993). A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*"Policy Statement/Assessing Forfeitures"*), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (1995); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (1995).

The 30 occasions on which WCAX-TV exceeded the hourly limits on commercial matter during children's programming is a high number of violations. Moreover, although five of the overages were 30 seconds in duration, a majority of the remainder were two minutes or greater in duration, including six overages of three to three and one-half minutes and eight overages of four to four and one-half minutes. Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by

Congress when it enacted the Children's Television Act of 1990. In addition, when the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that would have prevented Station WCAX-TV from complying with the children's television commercial limitations during the last license period. Finally, the fact that WCAX-TV may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $10,000.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith or that the violations reflect a deliberate disregard for Commission requirements. Rather, these violations reflect the licensee's failure to institute procedures sufficient to ensure compliance with the children's television commercial limitations. Accordingly, we do not believe that the violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station WCAX-TV would serve the public interest, convenience and necessity. Therefore, the license renewal application of Mt. Mansfield Television, Inc., File No. BRCT-931201LN, for Station WCAX-TV, Burlington, VT, IS HEREBY GRANTED for a term to end on April 1, 1999.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure
cc: William R. Richardson, Jr., Esq.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**August 9, 1995**

**Released: August 17, 1995**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Act III Broadcasting License Corporation F1800E
Licensee, WUHF(TV)
360 East Avenue
Rochester, NY 14604

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the amount of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Accordingly, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming (Report and Order)*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On February 1, 1994, you filed an application for renewal of license (FCC Form 303-S) for station WUHF(TV), Rochester, NY (File No. BRCT-940201LL). In a supplement you indicate that during the previous license term WUHF(TV) did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 3 to your application you cite 35 instances of commercial overages between January 2, 1992 and October 27, 1993, which you attribute to inadvertence and/or human error. Of these 35 commercial overages, six were fifteen seconds or less in duration; one was 25 seconds in duration; 19 were 30 seconds in duration; one was 40 seconds in duration; two were 45 seconds in duration; and six were program length commercials. You state that at the end of the first quarter of 1992, when the first 11 overages occurred, the station "reviewed the commercial[] limits with its personnel and instructed them regarding compliance"; and that when subsequent overages occurred, procedures were modified and/or responsible personnel were "reprimanded and instructed on the station's policies for compliance." Finally, you cite two instances where the station initiated its daily schedule by joining children's programs in progress. On Monday, March 16, 1992, the station broadcast five minutes of commercial matter in the 22 remaining minutes of a half-hour program joined in progress; and on Monday, August 16, 1993, the station broadcast five minutes of commercial matter in the 17 remaining minutes of a half-hour program joined in progress. However, you state that you do not believe that "pro-rating the commercials... in such a situation is required by the Commission's rules or is even feasible".

With regard to the two instances where the station initiated its daily schedule by joining children's programs in progress, in *Children's Television Programming (recon.)*, 6 FCC Rcd at 5096, the Commission specifically provides that broadcasters are required to prorate application of the commercial limits to program segments five minutes or longer in duration. You have provided no information, nor even alleged, that these incidents involved any last-minute emergency scheduling changes. Presumably, the station was aware that it was initiating its daily schedule by joining a children's program in progress. Therefore, the commercial limits were applicable pro rata to the portions of the programs which were broadcast. Under the formula established in *Children's Television Programming (recon.), id.* at note 40, the 22 remaining minutes of the half-hour program joined in progress should have contained no more than 4 minutes and 24 seconds of commercial matter; and the 17 remaining minutes of the half-hour program joined in progress should have contained no more than 3 minutes and 24 seconds of commercial matter. Accordingly, these programs exceeded the commercial limits by 36 seconds, and one minute 36 seconds, respectively.

WUHF(TV)'s record during the last license term of exceeding the Commission's commercial limits on children's television programming on 37 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Act III Broadcasting License Corporation is hereby advised of its apparent liability for forfeiture in the amount of fifteen thousand dollars ($15,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993). A recent decision by the U.S. Court of Appeals for the Dis-

trict of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*"Policy Statement/Assessing Forfeitures"*), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (1995); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (1995).

The 37 occasions on which WUHF(TV) exceeded the hourly limits on commercial matter during children's programming is a high number of violations. Moreover, although 30 of the overages were less than one minute in duration, one of the overages was longer than one minute, and six of the overages were program-length commercials. Congress was particularly concerned about program length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18.

In addition, when the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...[and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of transitional difficulties." *Children's Television Programming, supra* 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that would have prevented Station WUHF(TV) from complying with the children's television commercial limitations during the last license period. In view of the violations described in your renewal application, it is apparent that WUHF(TV) initially did not establish an effective program to ensure compliance with the children's television commercial limitations. Further, although you state that the station "reviewed the commercial[] limits with its personnel and instructed them regarding compliance" at the end of the first quarter of 1992 and periodically thereafter, additional violations continued to occur through October of 1993, including the six program-length commercials between February and October of 1993. The only reasons proffered for the cited overages, inadvertence and/or human error, do not justify or excuse the violations. Finally, the fact that WUHF(TV) may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $15,000.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith or that the violations reflect a deliberate disregard for Commission requirements. Rather, these violations reflect the licensee's failure to institute procedures sufficient to ensure compliance with the children's television commercial limitations. Accordingly, we do not believe that the violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station WUHF(TV) would serve the public interest, convenience and necessity. Therefore, the license renewal application of Act III Broadcasting License Corporation, File No. BRCT-940201LL, for Station WUHF(TV), Rochester, NY, IS HEREBY GRANTED for a term to end on June 1, 1999.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure
cc: Grover C. Cooper, Esq.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| | Northern Dakota County |
| Complaints Regarding Cable | Cable Communications |
| Programming Service Prices | Commission, MN |
| | City of Manteca, CA |
| | Town of Ramapo, NY |
| | City of Artesia, CA |
| | Charles Warrender, CT |
| | Hardin County, KY |
| | City of Henderson, KY |
| | Bruce Coleman, KY |
| | Don F. Tibbs, GA |
| | Don F. Tibbs, FL |
| | City of Canyon Lake, CA |
| | Kenton/Boone Counties Cable |
| | Television Board, KY |
| | City of Lauderhill, FL |
| | City of Monroe, NC |

## ORDER ON RECONSIDERATION

**Adopted: August 1, 1995; Released: August 17, 1995**

By the Chief, Cable Services Bureau:

1. This Order addresses requests for reconsideration[1] opposing the Commission's decision to return complaints filed by petitioners regarding cable programming service (CPS) prices. The Commission returned the complaints on the grounds that they were not filed with the Commission within the period provided for by our rules. The petitioners listed above request reconsideration and argue that their complaints should be accepted as timely filed. For the reasons set forth below, we grant petitioners' requests for reconsideration where complainants attempted to file a complaint on the February 28, 1994 deadline by facsimile and/or postmarked their complaint by the deadline and, in either case, sought reconsideration of the rejection of their complaints within the 30 day period provided by our rules. All other requests for reconsideration in this matter are denied.

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and Section 79.950 *et. seq.* of our rules, the Commission must review CPS prices upon the filing of a valid complaint.[2] The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] The 1992 Cable Act provides that such "complaints [must be] filed . . . during the 180-day period following the effective date of the [Commission's] regulations," and that "complaints [must be] filed within a reasonable period of time following a change in rates."[4]

3. The Commission adopted rules pursuant to the directives of the 1992 Cable Act, and those rules became effective on September 1, 1993. Under the Commission's rules, except with regard to small systems, parties seeking to challenge rates that were in effect on September 1, 1993 must file a complaint with the Commission on or by February 28, 1994.[5] Thereafter, parties challenge a rate change by filing a complaint with the Commission within 45 days after receiving a bill from the cable operator that reflects the rate change.[6]

4. Under Section 1.3 of the Commission's rules, any provision of the rules may be waived on petition if good cause is demonstrated.[7] In order to establish good cause, a party must provide a legitimate reason for not being able to file within the time specified.[8] We shall use the same "good cause" standard to justify making an exception to our policy which is modeled after the Commission rules. As discussed below, we find that an exception is warranted in those situations where complainants made attempts to file a complaint by facsimile on the filing date of February 28, 1994, but were unable to complete the filing due to technical difficulties in reaching the Commission via facsimile. We also find an exception for complainants who postmarked their complaints by February 28, 1994.

a. To trigger Commission jurisdiction over a cable operator's CPS rates, a complaint must be filed on FCC Form 329. Pursuant to FCC Form 329 instructions, a petitioner has the option to file a complaint via facsimile transmission or mail. Commission policy allows for facsimile filings by the due date.[9] Many of those complainants who opted to use facsimile transmission on the day of February 28, 1994, were unsuccessful due to the unforeseeable problem of busy lines blocking access to the Commission throughout the day. Petitioners who attempted to file

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[1] Complainants have made their requests for reconsideration in the form of petitions and letters. Hereinafter, complainants shall also be known as petitioners.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993); 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956.

[4] 47 U.S.C. §543(c)(3).

[5] Section 76.953 (a) of our rules states that:

> Notwithstanding paragraph (b) of this section, a complaint regarding a rate for cable programming service or associated equipment in effect on September 1, 1993 must be filed by February 28,1994, except as provided in §76.934(c) with regard to small systems.

47 C.F.R. §76.953(a).

[6] Section 76.953(b) states that:

> ...A complaint regarding a rate change for cable programming service or associated equipment must be filed with the Commission within 45 days from the date the complainant receives a bill from the cable operator that reflects the rate change.

47 C.F.R. §76.953 (b).

[7] 47 C.F.R. §1.3.

[8] *El Paso Cablevision, Inc.*, 57 FCC2d 95, 35 RR2d 1405 (1975). *See also Meredith/New Heritage Strategic Partners, L.P.* FCC 94-260 (released November 16, 1994).

[9] *Ventura County Cablevision*, DA 95-717 (released April 7, 1995).

by facsimile, argue that the inadequacy of the Commission's "doorway" should not preclude them from being heard.[10] Extraordinary circumstances beyond the control of the complainants precluded complainants from successfully filing via facsimile on February 28, 1994. In these situations, we find good cause exists to accept those complaints attempted to be filed by facsimile on February 28, 1994, even though the actual filing was not completed until after that date.

b. The second group of petitioners argue that their complaint was timely filed because it was postmarked by February 28, 1994. Although it is established Commission precedent that the filing date is the date by which a document must be received,[11] in this case it is in the interest of subscribers and in keeping with the intent of the 1992 Cable Act to accept those complaints postmarked by the filing date of February 28, 1994. The rate complaint form does not clearly state that a rate complaint challenging a rate that was in effect on September 1, 1993 has to be received by the Commission by a date certain. The form states only that the complaint must be filed by February 28, 1994.[12] On the other hand if the complainant is challenging a rate increase, the form specifically states that the complaint must be received by the Commission within 45 days from the date the complainant first received a bill showing the rate increase.[13] We recognize the confusion that complainants may have experienced due to the ambiguity of the term "filing date" in the one instance and the term "received by" in the other instance.[14]

c. Accordingly, petitions for reconsideration will be granted if the petitioner attempted to postmark or fax a complaint by the February 28, 1994 deadline, and if the petitioner filed a petition for reconsideration within 30 days from the date the late-filed complaint was returned.[15] These petitioners are listed in Attachment A. Petitions for reconsideration which were not filed 30 days after a late-filed complaint was returned, are hereby denied. Those Petitioners are listed in Attachment B.

5. One petitioner, listed in Attachment C, claims to have limited access to cable rate regulation information and did not discover the existence of the February 28, 1994 deadline until it expired. We do not believe that lack of awareness of our rules constitutes good cause sufficient to warrant granting a waiver of our rules.[16] The complainant has not presented adequate grounds for a waiver, since notice of the deadline was provided on FCC Form 329 itself, in the Commission's Public Notice of February 25, 1994,[17] and in various publications and outreach materials made available by the Commission staff. Accordingly, this petitioner's request for reconsideration is hereby denied.

6. Accordingly, IT IS ORDERED, pursuant to Sections 0.321, 1.7, and 76.953(a) and (b) of the Commission's rules, 47 C.F.R. §§0.321, 1.7, and 76/953(a) and (b), that the requests for reconsideration noted in Attachment A are GRANTED, and the request for reconsideration noted in Attachment B and Attachment C are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[10] *See, e.g.* Request for Reconsideration from Northern Dakota County Cable Communications Commission ("Dakota"), filed April 1, 1994, at p.1.

[11] We take special note that although it has been consistent Commission practice to consider documents filed when the document is received at the location designated by the Commission, this practice was not codified in 47 C.F.R. §1.7 until after the February 28, 1994 deadline.

[12] *See* Instruction 6 on FCC Form 329.

[13] *Id.*

[14] We will not accept these reasons in the future because any ambiguity surrounding the term "filing date" has been resolved in 47 C.F.R. § 1.7, which states that documents are filed when received at the location designated by the Commission.

[15] 47 C.F.R. § 1.106 (f) states that a petition for reconsideration shall be filed within 30 days from the date of public notice of the final Commission action.

[16] *See Meredith/New Heritage Strategic Partners, L.P.* FCC 94-260 (released November 16, 1994).

[17] *See* Cable Television Service Registrations Report No. 981 (released February 25, 1994).

ATTACHMENT A

| NAME OF COMPLAINANT | NAME OF OPERATOR | CUID NO. | FCC RETURN DATE | PETITION FOR RECONSIDERATION FILING DATE |
|---|---|---|---|---|
| City of Artesia | Insight Cablevision | CA1294 | 4/14/94 | 4/26/94 |
| Town of Ramapo | TKR | NY0448 | 3/25/94 | 4/4/94 |
| City of Manteca | Continental Cablevision | CA0817 | 3/29/94 | 4/8/94 |
| Hardin County | Telecable Radcliff<br>Renaissance CATV of KY | KY0330<br>KY1124 | 3/24/94 | 4/4/94 |
| Bruce Coleman | Tel-Com, Inc. | KY0268 | 3/29/94 | 4/12/94 |
| City of Canyon Lake | King Videocable | CA0699 | 3/24/94 | 4/6/94 |
| Kenton/Boone Counties Cable Television Board | TKR | KY0748 | 3/28/94 | 4/14/94 |
| Don F. Tibbs | Wometco Cablevision | GA0169<br>FL0758 | 7/1/94<br>7/1/94 | 7/22/94<br>7/22/94 |
| Northern Dakota County Cable Commission | Continental Cablevision | MN0515<br>MN0516<br>MN0517<br>MN0518<br>MN0519<br>MN0520<br>MN0521 | 3/25/94 | 4/4/94 |

## ATTACHMENT B

| NAME OF COMPLAINANT | NAME OF OPERATOR | CUID NO. | FCC RETURN DATE | PETITION FOR RECONSIDERATION FILING DATE |
|---|---|---|---|---|
| Charles Warrender | Century Norwich Corporation | CT0039 | 3/24/94 | 5/5/94 |
| City of Henderson | TCI | KY0144 | 3/29/94 | 8/26/94 |
| City of Monroe | Time Warner | NC0575 | 3/29/94 | 7/14/95 |

## ATTACHMENT C

| NAME OF COMPLAINANT | NAME OF OPERATOR | CUID NO. | FCC RETURN DATE | PETITION FOR RECONSIDERATION FILING DATE |
|---|---|---|---|---|
| City of Lauderhill | American d/b/a Continental | FL0815 | 3/24/94 | 4/6/94 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 95-45**

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Pahrump, Nevada) — RM-8605

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 8, 1995; Released: August 18, 1995**

By the Chief, Allocations Branch:

1. At the request of Gregory P. Wells ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 4027 (1995), proposing the allotment of Channel 236A to Pahrump, Nevada, as the community's second local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted.[1] An informal comment supporting the allotment was also filed by Richard Eyre-Eagles. No other comments were received.

2. We believe the public interest would be served by allotting Channel 236A to Pahrump since it could provide the community with its second local and first competitive FM service. Channel 236A can be allotted to Pahrump in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.1 kilometers (2.5 miles) west to avoid a short-spacing to Station KWNR, Channel 238C, Henderson, Nevada.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 2, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Pahrump, Nevada | 236A, 298C |

4. The window period for filing applications will open on **October 2, 1995**, and close on **November 2, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner's comments are filed late-filed. However, we will accept them for the purpose of stating continuing interest since this is not a contested proceeding and the allotment does not conflict with any other pending proposal.

[2] The coordinates for Channel 236A at Pahrump are 36-13-12 North Latitude and 16-01-43 West Longitude.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-100**

In the Matter of

Amendment of Section 73.202(b), RM-8175
Table of Allotments,
FM Broadcast Stations.
(Cleveland and Ebenezer,
Mississippi)

**MEMORANDUM OPINION AND ORDER**
**(Proceeding Terminated)**

**Adopted: August 9, 1995; Released: August 18, 1995**

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a Petition for Reconsideration filed by Afro-American Broadcasters of Mississippi ("Afro-American Broadcasters").[1] The *Report and Order* substituted Channel 280C3 for Channel 280A at Cleveland, Mississippi, and deleted the vacant Channel 280A at Ebenezer, Mississippi. Radio Cleveland, Inc. ("Radio Cleveland"), licensee of Station WCLD(FM), Cleveland, Mississippi filed an opposition to the petition for reconsideration. No other comments were filed.

2. *Background.* The proceeding began with the filing of a petition for rule making by Radio Cleveland and James L. Haffey d/b/a JimBar Enterprises ("JimBar"), proposing the substitution of Channel 280C3 for Channel 280A at Cleveland, Mississippi, and deletion of vacant Channel 280A at Ebenezer, Mississippi. In response to that petition, the Commission issued a *Notice of Proposed Rule Making,* 8 FCC Rcd 2739 (1993). In response to the *Notice,* Afro-American Broadcasters filed comments requesting retention of Channel 280A at Ebenezer stating its intention to file an application for the channel. Radio Cleveland filed comments stating that Ebenezer no longer qualified as a community for allotment purposes and supported the deletion of Channel 280A at Ebenezer. In addition JimBar, former permittee of Channel 280A at Ebenezer, filed comments arguing that he had determined that Ebenezer, an unincorporated community with a 1984 estimated population of 150, could not feasibly support an FM station in light of current economic conditions. Radio Cleveland, in reply comments, stated that Ebenezer has no local government, school system or local newspaper and is not listed in the U.S. Census. In the *Report and Order,* the Commission concluded that Ebenezer no longer qualified as a "community" for allotment purposes, stating that Afro-American Broadcasters, although provided an opportunity to response to JimBar's reasons for deletion of the channel, failed to provide any information as to why the channel at Ebenezer should be retained.

3. *Petition for Reconsideration.* Afro-American Broadcasters state that they timely filed comments expressing their interest in Channel 280A at Ebenezer, and stated their intention to file an application upon the opening of a filing window. Afro-American Broadcasters argue that the *Notice* did not request information "to establish that Ebenezer is community for allotment purposes" nor did the Commission give notice that it was considering deletion of the channel in the face of an expression of interest. They state for this reason, reconsideration and reinstatement of the Ebenezer allotment is fully warranted. Finally, Afro-American Broadcasters contend that Ebenezer is an identifiable population grouping with two churches, a volunteer fire department, one retail store and an Ebenezer water system. They note that the Commission has previously allotted FM Channels to communities having even less indicia than Ebenezer, citing *Yermo and Mountain Pass, California,* 45 RR 2d 58 (1979).

4. Radio Cleveland, in reply states it has demonstrated that Ebenezer no longer qualifies as a "community" for the purposes of Section 307(b). Radio Cleveland further submits that the Commission noted Afro-American Broadcasters' failure to address the discussion in the *Notice* regarding JimBar's reasons for deletion of the Ebenezer allotment, although given the opportunity to do so in comments and reply comments. Radio Cleveland believes that Afro-American Broadcasters had fair notice that the deletion of the Ebenezer allotment was being considered in the proceeding, and that if retention of the Ebenezer allotment was sought, information in support of the continued allotment of the Ebenezer channel should have been submitted. Furthermore, it notes where a substantial community no longer exists, an allotment can and should be deleted, citing *Report and Order* at para.6, *Flora and Kings, Mississippi,* 7 FCC Rcd 5477 (1992), at note 2, and *Garden City, Indiana,* 6 FCC Rcd 3747 (1991). Finally, Radio Cleveland argues that Afro-American Broadcasters have not advanced any persuasive information in support of its request for reconsideration. It notes that their contention that the Commission has not identified any facts regarding subsequent developments justifying the deletion of the Ebenezer allotment is incorrect. Radio Cleveland points out that the *Report and Order* indicated the substantial decline in Ebenezer's population, and its deteriorating economic conditions. Although Afro-American Broadcasters submits that Ebenezer has two churches, a volunteer fire department, a water system and a retail store with Ebenezer in its name, Radio Cleveland states these factors do not provide the basis for a finding that Ebenezer continues to be viable community.

5. *Discussion* We shall deny Afro-American Broadcasters' petition for reconsideration on the underlying merits of the case. While the *Notice* in this proceeding did not specifically request that the proponent of the Ebenezer allotment provide information regarding the community status of Ebenezer, the possible deletion of the Ebenezer allotment was quite clearly a subject of the rule making. The changing economic conditions of Ebenezer were discussed in the *Notice,* and parties had full opportunity to address the issue

[1] Public Notice of the petition for reconsideration was given on January 28, 1994, Report No. 1995.

of retention of the channel and relevant reasons to support their arguments. Radio Cleveland did just that, contending in its reply comments, that Ebenezer, an unincorporated community with a 1984 estimated population of 150, no longer qualified as a community for allotment purposes. Our deletion of the Ebenezer allotment, and the reasons therefore, were thus a logical outgrowth of the *Notice*.[2] Nonetheless, as both parties have fully addressed this issue in their pleadings on reconsideration, we will address it more fully here, considering the additional material and arguments presented by Afro-American Broadcasters.

6. The Commission's long standing policy is to allot channels to communities composed of geographically identifiable population groupings. This requirement is generally satisfied if the community is either incorporated or listed in the U.S. Census. Although the 1994 *Rand McNally Commercial Atlas* lists Ebenezer as having a population of 100, the community is neither incorporated nor listed in the U.S. Census. As stated in the *Report and Order*, "mere geographical location is not sufficient to establish community status." *See Vimville, Mississippi*, 48 FR 5974 (1983) and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991). Afro-American Broadcasters' belief that the Commission's prior decision to allot Channel 280A to Ebenezer provides further indicia of community is incorrect. The case at hand is analogous to the case of *East Hemet and Indio, California*,[3] in which the channel was deleted after the Commission received information that brought into question the community status of the area. In addition the Commission has stated in *Garden City, Indiana*,[4] that the inappropriate grant of a channel cannot be used later as qualifying indicia of the existence of a community when a question of error arises after the allotment has been made.

7. Afro-American Broadcasters submit that Ebenezer is an identifiable population grouping with two churches, volunteer fire department, one retail store and a water system. They argue that the Commission has previously allotted FM channels to communities having less indicia than Ebenezer, citing *Yermo and Mountain Pass, California*, 45 RR 2d 58 (Broadcast Bureau 1979). Afro-American Broadcasters state that there are similarities between the community of Mountain Pass and Ebenezer, since the Ebenezer station would serve travelers on an interstate highway. We find Afro-American Broadcasters' comparison of Ebenezer with Mountain Pass as further indicia of community status is unpersuasive. Afro-American Broadcasters provided no information as to the existence of any local government or other indicia of community status such as political, social, or business organizations, aside from a store and a volunteer fire department. Apart from two churches, Ebenezer has no civic organizations, such as a Chamber of Commerce, Lions Club or Rotary Club which identify with the community. Nor have they provided testimony of local residents attesting to Ebenezer's community status.[5] The allotment to Mountain Pass while lacking some of the indicia of a community as defined by the Commission, was found to be a town with "commonality of purpose" which did provide a first and second FM service to over 28,000 people and a second night-time aural service to almost 7,000 people. Ebenezer, on the other hand, would not provide service to any unserved or underserved areas. It receives reception service from thirteen radio stations, including one from Yazoo City, Mississippi, located only 10 miles away, which also has a vacant FM channel. After a review of the facts and arguments presented, we conclude that Afro-American Broadcasters has submitted no new information which would warrant the reversal of our earlier decision.

8. In view of the above, IT IS ORDERED, That the petition for reconsideration filed by Afro-American Broadcasters of Mississippi IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pam Blumenthal; Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[2] *See Pinewood, South Carolina*, 5 FCC Rcd 7609, 7610 (1990); *Weyerhaeuser Company v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978); and *Owensboro on the Air v. United States*, 262 F.2d (D.C. Cir. 1958). *See also Hannahs Mill, Georgia*, 7 FCC Rcd 3944, n.6 (1992).

[3] *East Hemet and Indio, California*, 3 FCC Rcd 823 (1988).

[4] *See Memorandum Opinion and Order, Garden City, Indiana*, 6 FCC Rcd 3747 (1991).

[5] *See Trade, Tennessee and Beech Mountain, North Carolina*, 6 FCC Rcd 5835 (1991).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Jones Intercable, Inc. CUID No. GA0003 (Augusta)

Benchmark Filing to Support
Cable Programming Service Price

## MEMORANDUM OPINION AND ORDER

**Adopted: July 11, 1995; Released: August 18, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Jones Intercable, Inc. CUID No. NE0026
(South Sioux City)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 11, 1995; Released: August 18, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Jones Intercable, Inc. CUID Nos. CA0342 (Palmdale)
CA0343 (Los Angeles)

Benchmark Filings to Support
Cable Programming Service Prices

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 17, 1995; Released: August 18, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Forms 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on June 6, 1994.[11]

5. Operator asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are equal to or lower than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. On Part II, Worksheet 1, Line 101 of its most recent amended filings, Operator entered $13.25 for the basic service tier and $6.75 for the CPS tier as its current monthly rates as of the initial date of regulation. However, Operator's rate card indicates that its actual monthly rates, exclusive of franchise fees, were $12.06 for the basic service tier and $9.75 for the CPS tier. The instructions require operators to enter on Line 101 their actual current monthly charges. We therefore corrected Line 101 to match the figures on Operator's rate card.

b. In Column G of Schedules A and C of Part III, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a subchapter "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculated Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

c. Operator's Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[13] However, Operator's entries on these two lines were substantially different. We therefore adjusted Line 104 to equal the amount entered on Line 34, which includes the correctly grossed-up tax entries.

d. Operator incorrectly calculated the Inflation Adjustment Factor (Part II, Worksheet 1, Line 127, and Part II, Worksheet 4, Line 401). Lines 122 and 125 of Form 393 require the operator to enter Gross National Product Price Index ("GNP-PI") data for the latest quarter for which data is available that ended before the date through which the Inflation Adjustment Factor is calculated. Operator calculated the Inflation Adjustment Factor through September 1993. However, Operator completed Lines 122 and 125 using GNP-PI data (released by the U.S. Department of Commerce on May 28, 1993) for the first quarter of 1993, rather than the third quarter of 1993. Operator's calculation of the Inflation Adjustment Factor is therefore incorrect.

e. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available in accordance with the Form 393 Instructions.[14] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculated an Inflation Adjustment Factor of 1.028 through September 1993, the base date Operator used in justifying its rates.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[15]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the franchise areas referenced in the caption and at Appendix A ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise areas shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[16] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the franchise areas listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[17]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

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[12] First Order on Reconsideration, Second Report and Order, and third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax-paying business entities to the extent that they have a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Question and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

[13] *See* Question and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

**Appendix A**

| CUID No. | Date First Complaint Filed with FCC | Date Complaint Served |
|---|---|---|
| CA0342 | 12/14/93 | 11/09/93 |
| CA0343 | 12/20/93 | 12/17/93 |

**Appendix B**

| CUID No. | Actual Rates | Maximum Permitted Rates |
|---|---|---|
| CA0342 | $9.71 | $9.59 |
| CA0343 | $9.71 | $9.59 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TCI Cablevision of Missouri, Inc. — CUID No. MO0031 (Jefferson City)

Benchmark Filing to Support
Cable Programming Service Price

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 7, 1995; Released: August 18, 1995**

By the Chief, Financial Analysis and Compliance Division:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Inland Valley Cablevision — CUID No. CA1385 (Uninc. Riverside County)

Complaints Regarding Cable Programming Service Rate

## MEMORANDUM OPINION AND ORDER

**Adopted: August 8, 1995; Released: August 18, 1995**

By the Chief, Cable Services Bureau:

## INTRODUCTION

1. Here we consider complaints about the price Inland Valley Cablevision ("Inland") was charging for its cable programming service ("CPS") tier in unincorporated Riverside County, California. Inland filed a motion to dismiss the complaints arguing that it is subject to effective competition and thus its cable programming service rate is not subject to regulation by the Commission.[1] Inland did not file a rate justification as required by the Commission Rules.[2]

2. The first complete and timely complaint regarding Inland's CPS rate for unincorporated Riverside County, California was filed with the Commission on December 7, 1993. In response to this complaint, Inland filed a motion to dismiss on December 14, 1993. On April 20, 1995 and July 24, 1995, Inland submitted additional information in response to requests by Commission staff for further documentation.[3] Because in this Order we are dismissing the complaints on the grounds that effective competition is present, we find it unnecessary to rule on Inland's other objections to the complaints filed against it in this franchise area.

## DISCUSSION

3. Inland asserts that its cable system is subject to low penetration effective competition, and therefore its cable programming service rate is not subject to rate regulation. Inland asserts that it serves fewer than 30 percent of the households (*i.e.*, occupied housing units)[4] within its franchise area, the unincorporated area of Riverside County.[5] Inland states that, based on projected estimates prepared by Mountain Mailings, a demographics consulting firm, as of June 1993,[6] there were 68,659 households in the relevant franchise area. Specifically, Inland claims that as of October 30, 1993, it served a total of 12,822 subscribers, or 18.7 percent, of the total number of households in the unincorporated area of Riverside County.[7] As supporting documentation, Inland submits a copy of a household trend report prepared by Mountain Mailings from which the estimated 1993 household data is derived. In addition, Inland provides a computer printout as of October 30, 1993 which indicates that it served 12,822 subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[8] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[9] Inland has met this burden.

5. Inland submits a computer printout establishing its subscribership as of October 30, 1993. As stated above, the first complete and timely CPS complaint against Inland was filed with the Commission on December 7, 1993. Petitions for reconsideration of certification require the cable operator to demonstrate effective competition based on data as of approximately the time of certification, but no earlier than two months before the request for certification was filed.[10] However, Riverside County has not filed for certification to regulate basic cable service rates. In such cases, we believe the appropriate date upon which to base our effective competition analysis is approximately as of the date that the CPS complaint was filed with the Commission. Because the subscribership data submitted by Inland predates the CPS complaint by less than two months, it is satisfactory to the Commission.

6. Turning to Inland's data, we find that Inland appropriately relied on data reflecting the number of households as required by our rules.[11] Relying on this data, Inland has

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[1] 47 C.F.R. § 76.905(a).

[2] 47 C.F.R. § 76.956; *see also* Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752, para. 3(1) (Cab. Serv. Bur. 1994).

[3] Letters from Matthew P. Zinn, attorney for Inland Valley Cablevision, to FCC staff (April 20, 1995 and July 24, 1995).

[4] As the Commission has noted, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." Third Order on Reconsideration, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "household" is defined by the Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[5] The Communications Act of 1934, as amended (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's Rules (47 C.F.R. § 76.905 (a)) provide that only rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. (Communications Act of 1934 § 623 (L)(1)(A), 47 U.S.C. § 543 (L)(1)(A)) and the Commission's Rules (47 C.F.R. § 76.905(b)(1)).

[6] Although a cable operator may rely on 1990 census data to establish the number of households (that is, occupied housing units) in its franchise area, an operator may use more recent data if such data is available. *See* Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates, 9 FCC Rcd 3656, ¶ 3 (Cab. Serv. Bur. 1993) (*"Effective Competition Order"*).

[7] Inland also asserts that it served 13,550 subscribers in May 1995. This corresponds to a 19.7 percent penetration rate.

[8] 47 C.F.R. § 76.906.

[9] *Cf.* 47 C.F.R. § 76.911(b)(1).

[10] *Effective Competition Order* at ¶ 3.

[11] *See supra* n.4 (discussing the Commission's *Third Order on Reconsideration).*

submitted sufficient evidence demonstrating that, as of December 7, 1993, its cable system serving the unincorporated areas of Riverside County served 12,822 of the 68,659 households, or 18.7 percent of the households within its franchise area. Accordingly, we find that Inland's system serving Riverside County, California was subject to effective competition on December 7, 1993.[12]

## CONCLUSIONS

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the motion of Inland Valley Cablevision to dismiss the complaints against its cable programming service price charged in unincorporated Riverside County, California, CUID No. CA1385, IS GRANTED.

8. IT IS FURTHER ORDERED that the complaints against the cable programming service price charged by Inland Valley Cablevision in unincorporated Riverside County, California, CUID No. CA1385, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] We note that Inland's system is apparently still subject to low penetration effective competition. As of May 1995, Inland served 13,550 of the 68,659 households, or 19.7 percent of the households, in its Riverside County franchise area.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TNI Associates File No. 316MS0009

Notice of Apparent Liability for Forfeiture Penalty for Station KNKM732 in the Public Land Mobile Service at Falls Church, Virginia

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 7, 1995; Released: August 18, 1995**

By the Chief, Enforcement Division:

## I. INTRODUCTION

1. TNI Associates (TNI) has filed a Request for Rescission or Reduction of the "Notice of Apparent Liability for Forfeiture" issued by the Chief, Mobile Services Division (MSD) for $6,000. *TNI Associates,* 8 FCC Rcd 1412 (Mobile Serv. Div. 1993) (*NALF*). For the reasons discussed below, the request is granted.

## II. BACKGROUND

2. On September 9, 1991, the Commission granted an authorization to TNI to operate on frequency 494.2125 MHz at Falls Church, Virginia. The expiration date of the authorization was September 9, 1992. On September 23, 1992, TNI filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement for the facility. The FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

3. In the *NALF,* the MSD found that because TNI commenced operation without timely filing FCC Form 489, it was in apparent violation of Section 22.9(b)(1) of the Commission's Rules, and that TNI's failure to file the FCC Form 489 until September 23, 1992, constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. In arriving at the $6,000 amount, the MSD used the Commission's *Policy Statement* on Forfeitures then in effect,[1] utilizing the base forfeiture amount for the violation and then adjusting the amount downward because the violation was relatively minor and because TNI voluntarily disclosed its failure to file the FCC Form 489.

## III. DISCUSSION

4. TNI argues in its Request that it timely constructed the facilities but due to a clerical error, it failed to file a timely FCC Form 489. TNI contends that as soon as the oversight was discovered, TNI promptly brought the matter to the Commission's attention by filing a new Form 489 and a request for reinstatement of the authorization.

5. TNI asserts that its relative lack of culpability was not considered. It also contends that the calculation of the forfeiture was arbitrary and capricious because there was no explanation what percentage downward adjustment amounts were made. It also argues that, prior to issuance of the NALF, TNI had not been cited for any violation of the Commission's Rules and, thus, TNI has a history of overall compliance which should have been taken into consideration. TNI contends that using even the minimum downward-adjustment criterion of 20 percent for "history of overall compliance," the *NALF* should have been adjusted downward by an additional amount, which, under the *Policy Statement,* would have eliminated the forfeiture. TNI alternatively states that if a forfeiture must be imposed, it should be nominal.

6. There is no dispute that TNI failed to timely file a FCC Form 489 and, therefore, its culpability, albeit, the result of an asserted oversight, nonetheless was present. After issuance of the *NALF* and the filing of TNI's Response, however, the *Policy Statement* was vacated on July 12, 1994, by the U.S. Court of Appeals for the D.C. Circuit in *United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994).* Due to this decision, the Commission has reassessed the forfeiture amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C. §503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). In this case, we see that the offense, failure to file FCC Form 489, is as stated, *supra,* at paragraph 3, a relatively minor violation. In the case, *AllCity Paging, Inc.,* 9 FCC Record 6485 (1994), the Commission found that for each violation of failing to file the form 489 (§22.9(b)(1) of the Rules), a forfeiture of $2,000 was warranted. Considering the above factors, and the *AllCity* case, we find that a forfeiture of $2,000, for the failure to file a form 489, is appropriate in this case as well. However, due to the fact that TNI voluntarily disclosed its failure to file the form 489, that it quickly took remedial action, and that it has a history of overall compliance with the Commission, we reduce the forfeiture to $1,000 as we did in *AllCity.* Then, considering these particular factors, and the fact that the administrative costs of pursuing a forfeiture could well exceed the benefits to the Commission, we have determined it to be in the best interests of the Commission to dismiss the case against TNI altogether.

[1] Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *revised,* 8 FCC Rcd 6215 (1993).

**IV. CONCLUSION AND ORDERING CLAUSES**

7. Accordingly, IT IS ORDERED that the Request for Reconsideration filed by TNI Associates in the captioned proceeding IS GRANTED.

8. IT IS FURTHER ORDERED that the Notice of Apparent Liability issued to TNI Associates IS DISMISSED.

9. IT IS FURTHER ORDERED that a copy of this Order BE SENT to TNI Associates, 3088 State Highway 27, Candle Park, New Jersey 08824, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

Afton Communications Corporation — File No. 63500-92-4-JSG

Notice of Apparent Liability for Forfeiture Penalty for Station KNKC693 in the Public Land Mobile Service at Tazewell, Virginia

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 7, 1995; Released: August 18, 1995**

By the Chief, Enforcement Division:

## I. INTRODUCTION

1. Afton Communications Corporation (Afton) has filed an application for review of a Common Carrier Bureau (Bureau) order[1] which denied Afton's request for reconsideration of a Notice of Apparent Liability for Forfeiture (*NALF*) issued by the Mobile Services Division (MSD) that proposed a $6,000 forfeiture.[2] For the reasons given below, we grant Afton's request to the Commission to rescind the forfeiture, and dismiss the case against Afton.

## II. BACKGROUND

2. On September 18, 1990, the Commission granted an authorization to Afton to operate on frequency 158.10 MHz at Tazewell, Virginia. The expiration date of the authorization was September 18, 1991. On September 12, 1991, Afton completed construction of the facilities and commenced operations. On October 4, 1991, Afton filed FCC Form 489, Notification of Status of Facilities, to request reinstatement. Because Afton completed construction within the required one-year period of construction, its authorization was found not to have expired. The *NALF* was issued on January 21, 1992, however, because Afton failed to file FCC Form 489 in a timely manner.

3. In the *NALF*, the MSD found that Afton had apparently violated Section 22.9(b)(1)[3] because Afton had commenced operation without filing FCC Form 489 with the Commission in a timely manner. The MSD found that Afton's failure to file the required Form 489 until October 4, 1991, constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act (the Act). Pursuant to the Policy Statement in effect at that time,[4] the MSD found that the base forfeiture amount for failing to file required forms was $30,000, but adjusted downward the amount by $15,000 because of its conclusion that failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because Afton voluntarily disclosed its failure to file the FCC Form 489. Consequently, the *NALF* established a $6,000 forfeiture.

4. Afton filed a petition for reconsideration, saying it provided service in one of the poorest parts of the country to emergency service providers for various localities, the Commonwealth of Virginia, hospitals, and medical operations. Afton claimed that it incurred start-up costs of about $35,000 and that its "owners/operators" received only $12,000 in compensation in 1991. Afton further asserted that it only could hire a full-time secretary/bookkeeper in February 1992, and that its after-tax profit for 1991 was $49,147.72, with the bulk going into new equipment. It also argued that the $6,000 forfeiture was 12 percent of its profit but that the Commission would not levy a 12 percent fine on large companies such as American Telephone and Telegraph Co. (AT&T) for a similar, relatively minor violation. Moreover, Afton claimed, AT&T (unlike small concerns such as Afton) has the resources to deal with the "maze" of government regulations. Afton objected to the *NALF*'s finding that Afton's violation was willful and repeated conduct. Afton said it made an error, discovered it 12 days after its construction permit expired and 18 days after it began operation of the station, and Afton's engineer brought the error to the MSD's attention. Afton stated that the MSD purportedly gave the impression that if Afton filed necessary forms and fees, that would suffice. Afton further claimed that the forms and fees were filed, according to Commission records, on October 4, 1991, but the MSD contacted Afton's engineer on December 9, 1991, requesting a letter of explanation for the late filing of the FCC Form 489.

5. In the *Afton Order*, the Bureau rejected Afton's arguments. The Bureau pointed out that Congress amended the Communications Act to increase substantially the maximum amounts of forfeitures that could be imposed under Section 503(b) and other sections of the Act. The Bureau also stated that the increases in the Commission's forfeiture authority placed licensees on notice that violators of the Act or Commission rules could be subject to substantial forfeitures. In addition, the Bureau said that the *1991 Forfeiture Policy Statement* implemented the statutory increases and that the *NALF* followed the guidelines in the *1991 Forfeiture Policy Statement* in proposing the forfeiture. *Id.* at 7 FCC Rcd 6742. The Bureau also rejected Afton's inability-to-pay arguments. In doing so, the Bureau stated that after reviewing additional updated financial information requested from, and provided by Afton, it found that Afton's unaudited total operating revenues were $153,457

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[1] *Afton Communications Corporation*, 7 FCC Rcd 6741 (Com. Car. Bur. 1992) (*Afton Order*).

[2] *Afton Communications Corporation*, Notice of Apparent Liability, 7 FCC Rcd 514 (Mobile Serv. Div. 1992).

[3] Section 22.9(b)(1) of the Commission's Rules provided that:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC

[4] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 4695 (*1991 Forfeiture Policy Statement*).

(for the annual period ending December 31, 1990), and its projected operating revenues were $217,960, from cash received from customers (for the annual period ending December 31, 1992). The Bureau, moreover, pointed out that the $6,000 forfeiture was about 3.91 percent of Afton's 1990 revenues and about 2.75 percent of Afton's projected 1992 revenues. The Bureau also stated that the Commission previously has stated that, in general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture and that use of gross revenues in determining a party's ability to pay is reasonable, appropriate, and a useful yardstick in helping to analyze a company's financial condition for forfeiture purposes, citing *PJB Communications of Virginia*, 7 FCC Rcd 2088-89 (1992). *Afton Order* at 7 FCC Rcd 6742. The Bureau also found irrelevant Afton's comparison of large and small businesses as justifying Afton's failure or inability to comply with the Commission's Rules by saying that failure to possess resources to comply with the Commission's Rules is no defense because the Commission's Rules do not distinguish as to the size of a licensee (whether financial or otherwise) in requiring compliance with its regulations, referencing Section 0.406 of the Commission's Rules. *Afton Order, id.* Further, the Bureau rejected Afton's suggestion that its violation did not constitute willful and repeated conduct. In this regard, the Bureau cited to Section 312(f) of the Act's definition of "willful" and said that Section also applies to Section 503 of the Act. *Id.* As for "repeated" conduct, the Bureau cited to its meaning under Section 312(f)(2) of the Act and said that Afton's failure to file Form 489 in a timely manner was deemed to be repeated because Afton's failure continued for more than one day, and, moreover, the definition applied to Section 503(b) as well. *Id.*

## III. DISCUSSION

6. Afton states that Section 22.43(a)(3) of the Rules gives a "grace period for irregularities" surrounding construction of facilities if they are due to causes beyond the applicant's control.[5] According to Afton, the circumstances surrounding its failure to file the FCC Form 489 were beyond its control because of personnel turnover and because it was training a new part-time secretary. Afton submits that the Commission should revise its policy of issuing forfeitures against carriers that voluntarily disclose their failure to file a Form 489 within the 30-day "grace period." In this regard, Afton claims that by routinely issuing forfeitures after carriers disclose violations, the Commission encourages dishonesty. Afton also renews arguments that it presented on reconsideration. For example, it argues that Afton's engineer contacted the MSD when Afton discovered its failure to file, that the MSD instructed the engineer on the necessary steps to comply with the Rules, and that the MSD led it to believe that if Afton complied, that would be sufficient. It also asserts that the *1991 Forfeiture Policy Statement* unfairly classified all common carriers together for forfeitures, *i.e.*, Afton receives the same forfeitures as AT&T despite the difference in size of operation and amount of revenue. As a result, Afton requests rescission of the $6,000 forfeiture.

7. The *Afton Order* referenced Section 0.406 of the Rules and properly rejected Afton's arguments that its size and asserted lack of resources were defenses to Afton's failure or inability to comply with our Rules.[6] We have a "continuing need ... to enforce our [Section 22.43(a)] construction and notification requirements. Licensees and permittees are expected to be fully cognizant of the Commission's rules and regulations. Those who violate these requirements do so at great risk." *T-Com, Inc.*, 5 FCC Rcd 6691 (1990). Simply put, compliance with the Commission's Rules is expected. We find that Afton has not established that its failure to file a timely FCC Form 489, notifying the Commission of completion of construction, on account of "personnel turnover" constitutes a cause beyond its control under what is now Section 22.142(c)(1), formerly 22.43(a)(3). Indeed, we find no support for its assertion in any prior Commission decisions involving Section 22.142(c)(1) since personnel decisions are typically within the licensee's control. Consequently, because Afton has not demonstrated or supported its assertion in this regard, its claim of a "grace period for irregularities" is of no avail. Additionally, the statutory increases in the maximum amounts of forfeitures which could be imposed did not distinguish between common carrier licensees based on size or revenues.[7]

8. Because the *1991 Forfeiture Policy Statement* implemented the statutory increases in the maximum amounts of forfeitures that could be imposed under Section 503(b) and because the *NALF* followed the *1991 Forfeiture Policy Statement*'s guidelines, the use of the *1991 Forfeiture Policy Statement*'s base forfeiture amount was not in error. Furthermore, the *NALF* utilized two downward-adjustment criteria which substantially reduced the base forfeiture amount; the *Afton Order* properly rejected Afton's inability-to-pay assertions and correctly upheld the imposition of the $6,000 forfeiture.

9. Importantly, however, we note that on July 12, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines discussed in the *1991 Forfeiture Policy*

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[5] The relevant portion of Section 22.43(a) provides:

> ... Within 30 days after the authorization expires an application for reinstatement may be filed on FCC Form 489. An application for reinstatement will only be considered if the application demonstrates that the failure to file a timely application for extension or notification of completion of construction was due to causes beyond the applicant's control.

[6] The first paragraph of Section 0.406 provides:

> Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business. All of the rules have been published and are readily available. See §§ 0.411(b), 0.412, and 0.415. For the benefit of those who are not familiar with the rules, there is set forth in this section a brief description of their format and contents.

[7] Pub. L. No 239, 101st Cong., 1st Sess., 103 Stat. 2131 (signed into law Dec. 19, 1989). As the *Afton Order* noted at 7 FCC Rcd 6742 n.3, the Commission amended Section 1.80 of its Rules to reflect the Section 503(b) increases. *Amendment of Section 1.80 of the Commission's Rules to Modify Forfeiture Amounts*, 5 FCC Rcd 3708 (1990).

*Statement. See, United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994).* Due to this decision, the Commission has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). Here, we see that the offense, failure to file FCC Form 489, is as stated, *supra,* at paragraph 3, a relatively minor violation. In the case, *AllCity Paging, Inc.,* 9 FCC Record 6485(1994), the Commission found that for each violation of failing to file the form 489 (§22.9(b)(1)) of the Rules), a forfeiture of $2,000 was warranted. Considering these factors, and the *AllCity* case, we find that a forfeiture of $2,000, for the failure to file a form 489, is appropriate in this case as well. However, due to the fact that Afton voluntarily disclosed its failure to file the form 489, and that it did file the form as soon as it realized its mistake, we reduce the forfeiture to $1,000, as we did in *AllCity.* Then, considering these particular factors, and the fact that the administrative costs of pursuing a forfeiture could well exceed the benefits to the Commission, we have determined it to be in the best interests of the Commission to dismiss the case against Afton altogether.

## IV. CONCLUSION AND ORDERING PARAGRAPHS

10. Based upon the foregoing, we are cancelling the *Afton NALF.*

11. Accordingly, IT IS ORDERED that the Request for Rescission or Reduction filed by Afton Communications Corporation in the captioned proceeding IS GRANTED.

12. IT IS FURTHER ORDERED that the Notice of Apparent Liability for Forfeiture, File No. 63500-92-4-JSG, IS CANCELLED.

13. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Afton Communications Corporation by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

Digital Mobile Communications, Inc. File No. 216MS0031

Notice of Apparent Liability for Forfeiture Penalty for Station KQC884 in the Public Land Mobile Service at Dearborn, Michigan

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 8, 1995; Released: August 18, 1995**

By the Chief, Enforcement Division:

## I. INTRODUCTION

1. Digital Mobile Communications, Inc. (Digital) and Digital Mobile Communications, Inc.-Michigan (Digital-Michigan) (collectively, respondents) have filed a Response to the Notice of Apparent Liability for Forfeiture (*NALF*) released on January 22, 1993. *See Digital Mobile Communications, Inc.*, 8 FCC Rcd 491 (1993). Respondents set forth in their pleading several arguments in support of their request for remission of or, alternatively, a substantial reduction in the forfeiture. For the reasons stated below, we affirm our finding of liability, but reduce the forfeiture amount from $40,000 to $5,000 on our own motion.

## II. BACKGROUND

2. In September 1989, Radio Relay Corp.-Michigan (Radio Relay), the predecessor in interest of Digital-Michigan, filed FCC Form 489 notifying the Commission of the construction and operation of a new location to provide public land mobile service on frequency 35.58 MHz at Dearborn, Michigan. As set forth in the *NALF*, because the station was located above Line A (as defined in Section 1.955(e) of the Commission's Rules, 47 C.F.R. § 1.955(e)), frequency coordination of this station with Canada was required prior to construction and operation. Radio Relay, however, did not perform the required coordination. The *NALF* found that because prior Commission approval was required due to the Line A coordination obligation, Radio Relay's filing of FCC Form 489 did not authorize its operation of the transmitter. Because Radio Relay did not receive the necessary FCC authorization before constructing its facilities, the NALF concluded that Radio Relay committed an apparent violation of Section 301 of the Communications Act and Sections 22.3 and 22.117 of the Commission's Rules. We assessed the forfeiture upon Digital-Michigan because control of Radio Relay was transferred to BellSouth Enterprises, Inc. (BellSouth) in July 1991, and the name changed to Digital-Michigan. The *NALF* determined that Digital-Michigan had been operating the Dearborn station without authorization since July 31, 1991. The *NALF* found that the unauthorized operation constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. Consequently, the *NALF* assessed a $40,000 forfeiture pursuant to the Policy Statement then in effect.[1]

## III. RESPONSE TO NALF

3. Respondents assert that Digital (as opposed to Digital Michigan, former licensee of the station) has never been the licensee of Station KQC884 and, thus, there is no basis for imposing a forfeiture upon Digital. (Respondents in their Response do not explain the relationship between Digital and Digital-Michigan.) Moreover, respondents contend that a forfeiture against Digital-Michigan is not warranted because Digital-Michigan reasonably relied upon Radio Relay's presentment of authority for operating the facility. They claim that both the company that controlled Radio Relay and BellSouth exercised due diligence prior to the filing of the transfer application. Respondents further contend that their investigation failed to disclose that the FCC Form 489, filed by Radio Relay under Section 22.117(b), did not authorize Radio Relay to operate the facility as a "fill-in" transmitter, (*i.e.*, a transmitter location whose service contour does not extend beyond previously authorized service contours on the same frequency). Respondents allege that the completed FCC Form 489, on its face, would not lead a reasonable person to question the Form's validity. Respondents argue that after Digital-Michigan became the licensee of the Station, it had no reason to question whether it possessed proper authorization to operate the station. Respondents further assert that Radio Relay's FCC Form 489 was included in the transfer application approved by the Commission and that Digital-Michigan moved quickly to obtain authority to operate the facility when it became aware that the "fill-in" application did not constitute proper operating authority. They emphasize that Digital-Michigan's operation did not result in any interference complaints from its Canadian neighbors. As a result, they assert that the forfeiture should be remitted or significantly reduced.

## IV. DISCUSSION

4. Respondents' assertions concerning the liability of Digital are misplaced, because we did not propose to assess a forfeiture on Digital. The *NALF* stated that control of Radio Relay was transferred to BellSouth and the name changed to Digital-Michigan. *See NALF* at 8 FCC Rcd 491 n.1. The caption of the *NALF* inadvertently mentioned Digital, but all references in the text of the *NALF* are to Digital-Michigan as the licensee of Station KQC884. See, *e.g.*, language in paragraph seven of the *NALF* which specifically stated that, "Digital Mobile Communications, Inc.-Michigan IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of forty thousand dollars ($40,000)...." *NALF* at 8 FCC Rcd 491. Therefore, respon-

[1] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*1991 Forfeiture Policy Statement*).

dents' argument that we cannot impose a forfeiture on Digital is not relevant since we imposed the fine on Digital-Michigan, licensee of Station KQC884.

5. We reject respondents' assertion that imposition of a forfeiture against Digital-Michigan is not warranted because it reasonably relied on Radio Relay's presentment of operating authority and claims to have exercised due diligence. There is no dispute that the location of the facilities is above Line A, and, therefore, Radio Relay's filing of FCC Form 489 did not authorize it to operate the facility. Thus, prior to the transfer of control, Radio Relay constructed and operated the station, in violation of Section 301 of the Act and Sections 22.3 and 22.117 of the Commission's Rules. However, respondents do not dispute that Digital-Michigan continued the unauthorized operation after it acquired the license to the station. Regardless of respondents' claim that they exercised due diligence, the fact remains that Digital-Michigan operated the Dearborn transmitter without proper FCC authorization. Moreover, Digital-Michigan's mistaken belief that it was operating a "fill-in" station is irrelevant. Operation of a facility above Line A – whether or not it is a "fill-in" – requires frequency coordination and, thus, prior Commission approval.

6. When the Commission reviews and approves transfer-of-control applications, it does not review all previous filings because licensees are expected to operate at all times in accordance with the Commission's Rules. It is the responsibility of the parties to ensure that all of the facilities encompassed by the license that is the subject of the transfer are being operated by the transferor in accordance with the Commission's Rules. Thus, when the Commission approved the transfer of Station KQC884 from Radio Relay to BellSouth, it did not pass upon the merits of the FCC Form 489 attached to the transfer application. We therefore do not agree that the Commission's approval of the transfer shields Digital-Michigan from liability for unauthorized operation of a radio facility.

7. Finally, the fact that Digital-Michigan's operation assertedly did not cause any interference with Canadian radio facilities does not negate the seriousness of the violation. Construction and operation of facilities in close proximity to the Canadian border without prior frequency coordination with Canada cannot be deemed to be a minor violation in view of the Commission's arrangements with the Canadian Government pursuant to mutual agreements.[2] In any event, the asserted absence of interference is irrelevant because the violation was operation without authorization. Thus, interference is not a precondition for finding that respondents violated our rules.

8. We note that in assessing the forfeiture amount of $40,000, the Bureau followed the forfeiture guidelines established in the Commissions 1991 Forfeiture Policy Statement. However, on July 12, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *See, United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994)*. Therefore, on reconsideration, the Commission has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). In this case, we see that one offense, failure to obtain FCC authorization, is the same offense as in the somewhat recent case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994), wherein the Commission found that for each violation of failing to secure Commission authorization, a forfeiture of $3,500 was warranted. Considering the above factors, the *AllCity* case, and the added fact that this case involved a violation of Section 22.117, operation of a facility above Line A in Canada, we find that a forfeiture of $5,000 is appropriate. Therefore, we are reducing the forfeiture imposed upon Respondents to $5,000.

## V. CONCLUSION

9. We conclude for the reasons set forth above that there is no basis upon which to grant respondents' request to cancel the forfeiture. Nonetheless, on our own motion we are reducing the amount to $5,000 as reflective of the statutory guidelines set out in the Act at 47 U.S.C. §503(b)(2)(D).

## VI. ORDERING PARAGRAPHS

10. Accordingly, IT IS ORDERED that the Response in the above-captioned proceeding, filed by Digital Mobile Communications, Inc. and Digital Mobile Communications, Inc.-Michigan IS DENIED.

11. IT IS FURTHER ORDERED that the forfeiture IS REDUCED to $5,000.

12. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Digital Mobile Communications Inc.-Michigan SHALL FORFEIT to the United States the sum of five thousand dollars ($5,000) for violation of the aforementioned statutory and rule provisions. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

13. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

14. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Digital Mobile Communications Inc. and Digital Mobile Communications. Inc.-Michigan by Certified Mail, Return Receipt Requested.

[2] Section 1.955 of the Commission's Rules,. 47 C.F.R. § 1.955, specifically notes that since May 1950 the Commission and the Canadian Department of Communications have operated under an arrangement that calls for the exchange of frequency assignment information and engineering comments on proposed assignments along the Canada-United States borders.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

DIAL-A-PAGE, INC. File No. 163500-92-1-A-BFW

Notice of Apparent Liability for
Forfeiture Penalty for Station KUC891
in the Public Land Mobile Service at
Mt. Pleasant, Texas

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 7, 1995; Released: August 18, 1995**

By the Chief, Enforcement Division:

## I. INTRODUCTION

1. Dial-A-Page, Inc. (Dial) has filed a petition for reconsideration of a Memorandum Opinion and Order[1] which granted in part and otherwise denied Dial's request for reconsideration of a "Notice of Apparent Liability for Forfeiture" (*NALF*) released on March 31, 1992.[2] Dial sets forth in its pleading several arguments in support of its request for cancellation or a further reduction of the forfeiture. For the reasons stated below, we affirm our finding of liability but reduce the forfeiture amount from $32,000 to $3,500. By ensuring that our licensees are in compliance with the Communications Act and the Commission's Rules, our action will promote full and fair competition to the benefit of the Nation's economy.

## II. BACKGROUND

2. On January 12, 1989, Dial filed an application for authority to add an additional location for Station KUC891 to operate on frequency 152.24 MHz at Mt. Pleasant, Texas (Mt. Pleasant). Dial constructed the Mt. Pleasant station pursuant to Section 22.43(d) of the Commission's Rules. Although permitted to constructate the facility but failed to do so and began operating before receiving authorization. On April 2, 1991, a Commission engineer from the Dallas, Texas, Field Office (Dallas FO) who was investigating television interference (TVI) complaints in the Mt. Pleasant area contacted Dial regarding the unauthorized operation of the facility. Dial turned off the transmitter on April 3, 1991.[3]

3. The *NALF* stated that apparent violations of Section 301 of the Communications Act (the Act) and Sections 22.43(d)(6) and 22.9(b)(1) of the Commission's Rules occurred because Dial commenced operation without authorization, Dial did not notify the Commission of commencement of operations, and Dial's operation constituted willful and repeated conduct within the terms of Section 503(b) of the Act. The *NALF* explained that pursuant to the *Policy Statement* then in effect,[4] the base forfeiture amount for operation at an unauthorized location was $40,000 and that no adjustments to the figure appeared appropriate. The *NALF* thus assessed a $40,000 forfeiture.

4. Dial filed a petition and supplement for reconsideration and rescission of the *NALF,* saying an employee incorrectly thought the application had been granted and wrongly activated the transmitter around February 28, 1991, and, moreover, no existing or potential subscribers were provided service. Dial claimed the Commission usually seeks additional information from a licensee prior to issuing a NALF but did not do so in this case. It argued the *NALF* was illegally adopted because the forfeiture was based upon the *1991 Forfeiture Policy Statement,* assertedly an *ex post facto* applying of new standards purporting to be a policy change not subject to normal rule-making procedures required by the Administrative Procedure Act (APA). It attacked the *1991 Forfeiture Policy Statement* because common carriers pay forfeitures far out of proportion to the gravity of the violation involved, especially when compared to other types of licensees. It asserted the transmitter operated without authorization from February 28, 1991, to April 3, 1991, but the *NALF* was issued on March 31, 1992, thus putting the bulk of the violation period outside the one-year statute of limitations per Section 503(b)(6)(B) of the Act because the only cognizable part of the unauthorized period was April 1, 2, and 3, 1991. Dial also contends it had a long history of compliance with the Commission's Rules but such compliance was not reflected by the *NALF.* Dial also contended the forfeiture was inconsistent with *MobileComm of Memphis, Inc.,* 7 FCC Rcd 1499 (Mob. Serv. Div. 1992) (*MobileComm),* assertedly decided under the *1991 Forfeiture Policy Statement,* the case was a comparable one, and the differences between *MobileComm* and Dial required a lesser Dial penalty because MobileComm was invited to negotiate its penalty and allowed to pay a $8,000 forfeiture without a finding of wrongdoing whereas Dial "[was] treated like an outlaw" and ordered to forfeit $40,000 without a chance for discussion.[5]

5. The *Dial Order* stated there was no need to obtain more information from Dial before issuance of the *NALF* because all relevant facts were at our disposal and, further, Dial did not dispute the factual background and circumstances in the *NALF* but, rather, admitted its violation.[6] It pointed out that Congress amended the Act in 1989 to increase substantially permissible maximum forfeiture

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[1] *Dial-A-Page, Inc.,* 8 FCC Rcd 2767 (1993) (*Dial Order).*

[2] *Dial-A-Page, Inc.,* Notice of Apparent Liability for Forfeiture, 7 FCC Rcd 2204 (1992).

[3] The Mobile Services Division (MSD) granted Dial's application on April 4, 1991, before the Dallas FO engineer brought Dial's unauthorized operation to the attention of the MSD.

[4] *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *revised,* 8 FCC Rcd 6215 (1993) (*1991 Forfeiture Policy Statement).*

[5] In *MobileComm,* the MSD and MobileComm reached an agreement resolving matters in a Consent Decree. As to the alleged wrongdoing in that proceeding, the MSD believed that a *prima facie* case existed establishing that MobileComm operated six control antennas at an unauthorized location. The Consent Decree was for purposes of settlement only with MobileComm's signing not being an admission of any violation, and MobileComm agreed to make a $8,000 voluntary contribution to the U. S. Treasury to end the matter.

[6] The *Dial Order* indicated that before the *NALF* was issued, MSD staff requested from the Dallas FO copies of correspon-

amounts under Section 503(b) and other sections of the Act, that the increases in the Commission's forfeiture authority put licensees on notice that violations could be subject to substantial forfeitures, that the *1991 Forfeiture Policy Statement* only reflected the statutory Section 503(b) increases and did not impose any *ex post facto* application of any new standards, and that the Commission previously had rejected arguments that the *1991 Forfeiture Policy Statement* was adopted in violation of the APA. It also rejected Dial's claim that its violation was not willful and repeated conduct, stating that a violation occurring via inadvertence does not prevent it from being willful and the fact the misconduct was by an employee was not relevant because a licensee is responsible under the doctrine of *respondeat superior,* whether or not violations were intentional or inadvertent. The *Dial Order* found that Dial's unauthorized operation continued for more than one day within one year of issuance of the *NALF,* found that the Act deemed the action "repeated", and, thus, found Dial's arguments concerning the statute of limitations and three-day "cognizable unauthorized period" irrelevant. The *Dial Order* also rejected Dial's assertions regarding the *MobileComm* case, saying that case was not decided under Section 503(b) or the *1991 Forfeiture Policy Statement* because it involved an agreed-upon Consent Decree as opposed to issuance of a NALF and, further, MobileComm did not agree that a violation existed but was willing to sign a consent decree to end the potential for litigation. Further, neither Section 503(b) nor the *1991 Forfeiture Policy Statement* entails any ascribing of a dollar amount per day for a forfeiture. The *Dial Order,* however, accepted Dial's contention that the forfeiture should be adjusted downward for its "history of overall compliance" applied a downward adjustment criterion, and reduced the proposed forfeiture from $40,000 to $32,000.

## III. PETITION FOR RECONSIDERATION

6. Dial argues that the *Dial Order*'s discussion of permissible increased forfeitures and notice to licensees of potentially higher forfeitures does not deal with the equities of the matter because each assessed forfeiture is to be handled on its own merits; thus, Dial claims its proposed forfeiture is totally out of proportion to the gravity of the offenses and clearly inappropriate when compared to forfeiture levels for other services. It asserts that not only has the Commission failed to deal with the nature, circumstances, extent, and gravity of the "relatively innocuous violation," but it has completely failed to put the violation in context by considering the inordinate delays by the Commission in processing Dial's underlying application for authorization to operate the facility. It contends that although the delay might not excuse the violation, the Commission should consider the processing delay, which was caused in part by a fraudulent, mutually-exclusive application and the Commission's protracted inaction. Dial also argues that the Commission treated Dial disparately than the *MobileComm* licensee. Dial asserts that contrary to the *Dial Order*'s statement that MobileComm did not admit a violation, a review of the MobileComm file shows that the licensee admitted the violation in a February 7, 1992 letter to the Commission. Thus, Dial asserts, there is absolutely no justification for fining Dial more than MobileComm's $8,000 contribution. Dial further states that based upon widespread reports, the Commission will reexamine its forfeiture policies in general and Dial's matter should be included within the scope of that reexamination.

## IV. DISCUSSION

7. Contrary to Dial's assertions, the *Dial Order* dealt with the nature, circumstances, extent, and gravity of Dial's violation first, by setting forth the background leading to the violation and then by pointing out that, essentially, the asserted reason for the violation was irrelevant for purposes of assessing a forfeiture. Moreover, we reject Dial's claim that its violation was a "relatively innocuous violation." There is nothing innocuous about operating facilities without prior authorization from the Commission and, thus, it appears presumptuous of Dial to imply that its violation of the Act is harmless. Further, any delay in processing Dial's underlying application requesting authorization is irrelevant; whatever delays occurred had absolutely nothing to do with the fact that Dial commenced operating before receiving authorization, and Dial itself acknowledges this fact. We also find no merit regarding assertions of unfair treatment accorded Dial *vis-a-vis MobileComm.* The *Dial Order* addressed the distinctions between that Consent Decree and Dial. The Commission has a panoply of remedies by which to resolve proceedings, including violations of the Act and Commission Rules. In the case of the licensee, MobileComm, the MSD chose to resolve the matter by entering into a consent decree; in the case of Dial, we chose to resolve the matter by issuing a NALF.[7] An agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. *See United States v. Batchelder,* 442 U. S. 114, 123-124 (1979); *United States v. Nixon,* 418 U. S. 683, 693 (1974); *Vaca v. Sipes,* 386 U. S. 171, 182 (1967); *Confiscation Cases,* 7 Wall. 454 (1869). In other words, the Commission has wide latitude in the way in which it chooses to resolve proceedings.

8. We note that in assessing the forfeiture amount of $32,000, the Bureau followed the forfeiture guidelines established in the Commission's 1991 Forfeiture Policy Statement. However, on July 12, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *See, United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994).* Therefore, on reconsideration, the Commission has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such

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dence between Dial and the Dallas FO involving the latter's investigation of the TVI complaints and discovery of Dial's unauthorized Mt. Pleasant transmitter. The Dallas FO submitted the requested material to the MSD, which contained various Dial statements given to the Dallas FO.

[7] As for Dial's statement that MobileComm admitted outright its violation in a letter to the Commission, we find that Dial is correct about the February 1992 letter. Nonetheless, Paragraph 10 of the *MobileComm* Consent Decree specifically states: "This Decree is for purposes of settlement only, and its signing does not constitute an admission by MobileComm of any violation of law, rules or policy." 7 FCC Rcd at 1501. It is thus obvious, then, that the *Dial Order* was referring to this language in stating that the licensee did not agree that a violation existed.

matters as justice may require." 47 U.S.C. §503(b)(2)(D). Furthermore, in this case, we see that the offense, failure to obtain FCC authorization, is the same offense as in the somewhat recent case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994), where the Commission found that for each violation of failing to secure Commission authorization, a forfeiture of $3,500 was warranted. Considering the above factors, and the *AllCity* case, we find that a forfeiture of $3,500, for the failure to secure Commission authorization, is appropriate in this case as well. Therefore, we are reducing the forfeiture imposed upon Dial to $3,500.

## V. CONCLUSION

9. We conclude for the reasons set forth above that there is no basis upon which to grant Dial's arguments. Nonetheless, on our own motion we are reducing the amount to $3,500 as reflective of the statutory guidelines set out in the Act at 47 U.S.C. §503(b)(2)(D).

## VI. ORDERING PARAGRAPHS

10. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Dial-A-Page, Inc. in the above-captioned proceeding IS DENIED.

11. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Dial-A-Page, Inc. SHALL FORFEIT to the United States the sum of three thousand five hundred dollars ($3,500) for violation of Section 301 of the Communications Act and Sections 22.43(d)(6) and 22.9(b)(1) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument, noting the above-captioned file number on its payment, to the Commission within thirty (30) days of the release date of this Order, payable to the order of the Federal Communications Commission, at: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

12. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

13. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Dial-A-Page, Inc., 111 East 13th Street, P.O. Box 987, Russellville, AR 72801, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

High Tech Communications of Iowa, Inc.

Notice of Apparent Liability for Forfeiture Penalty for Station KNKG445 in the Public Land Mobile Service at Tipton, Iowa — File No. 316MS0008

Notice of Apparent Liability for Forfeiture Penalty for Station KNKG445 in the Public Land Mobile Service at Tipton, Iowa — File No. 316MS0012

Notice of Apparent Liability for Forfeiture Penalty for Station KNKG447 in the Public Land Mobile Service at East Moline, Illinois — File No. 316MS0011

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 7, 1995; Released: August 18, 1995**

By the Chief, Enforcement Division:

## I. INTRODUCTION

1. High Tech Communications of Iowa, Inc. (High Tech) has filed a Consolidated Request for Rescission or Reduction of Forfeiture of three separate Notices of Apparent Liability for Forfeitures (NALFs), each in the amount of $6,000. *See High Tech Communications of Iowa, Inc.*, 8 FCC Rcd 1580 (Mobile Serv. Div. 1993), *High Tech Communications of Iowa, Inc.*, 8 FCC Rcd 1740 (Mobile Serv. Div. 1993) (collectively, the *Tipton NALFs)*, and *High Tech Communications of Iowa, Inc.*, 8 FCC Rcd 1738 (Mobile Serv. Div. (1993) (*East Moline NALF)*. For the reasons discussed below, we grant High Tech's request to rescind the NALFs.[1]

## II. BACKGROUND

2. On October 3, 1991, and November 19, 1991, the Commission granted separate authorizations to High Tech to operate on frequencies 931.1375 MHz and 959.9375 MHz at Tipton, Iowa. The expiration dates of these authorizations were October 3, 1992, and November 19, 1992, respectively. In addition, on October 4, 1991, the Commission granted an authorization to High Tech to operate on frequency 931.1375 MHz at East Moline, Illinois. The expiration date of that authorization was October 4, 1992. On December 18, 1992, High Tech filed three separate FCC Form 489s, Notification of Status of Facilities, requesting reinstatement of the authorization for each facility. Each FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

3. In each NALF, the Chief, Mobile Services Division (MSD) found that because High Tech commenced operation without timely filing FCC Form 489, it was in apparent violation of Section 22.9(b)(1) of the Commission's Rules,[2] and that High Tech's failure to file the FCC Form 489s until December 18, 1992, constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. Moreover, in each NALF, the MSD stated thatpursuant to the Commission's *Policy Statement* on Forfeitures then in effect,[3] the base forfeiture amount for failing to file required forms was $30,000 but the MSD, however, adjusted the forfeiture downward by $15,000 because the violation was a relatively minor one and by an additional $9,000 because High Tech voluntarily disclosed its failure to file the FCC Form 489. As a result, the MSD assessed a $6,000 forfeiture in each NALF.

## III. DISCUSSION

4. High Tech claims that it timely built the East Moline facilities, but inadvertently failed to file a timely FCC Form 489 for that location. It asserts that when the oversight was discovered, it instructed its counsel to prepare the necessary notification and reinstatement application immediately, making full disclosure to the Commission of the inadvertent failure to file the Form 489. High Tech contends that it also conducted a review of its records for other radio facilities, which disclosed that no FCC Form 489s had been filed for the two facilities authorized for the Tipton locations. High Tech instructed its counsel to file Form 489 notifications and requests for reinstatement of the two Tipton facilities. High Tech contends that although equipment was ordered for the Tipton facilities, those facilities were not built before the construction permit for the sites expired, and that due to an incorrect notation in its records and miscommunication between its main office and its subcontractors in the field, High Tech mistakenly believed the Tipton facilities also were built. High Tech

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[1] Subsequent to the filing of the Consolidated Request, High Tech filed a letter indicating a name change from High Tech Communications of Iowa, Inc., to High Tech Communications Corp. of Iowa. A new mailing address was also provided.

[2] Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

[3] Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*1991 Forfeiture Policy Statement)*.

does not indicate the date it discovered its mistakes. After the *Tipton NALFs* were issued, High Tech formally withdrew the FCC Form 489s for the Tipton facilities.

5. High Tech argues that because it did not construct the Tipton facilities, no filings were required and, hence, the *Tipton NALFs* should be cancelled. As for the *East Moline NALF*, High Tech asserts that, prior to issuance of the three NALFs, High Tech had not been cited for any violations of the Commission's rules. Accordingly, High Tech submits that it has a history of prior compliance with the Commission's Rules which should have been taken into consideration. High Tech adds that using even the minimum downward-adjustment criterion of 20 percent for "history of prior compliance," the *East Moline NALF* should have been adjusted downward by an additional $6,000, thereby eliminating the forfeiture.

6. In light of High Tech's statement that the Tipton facilities were never constructed, we agree that no FCC Form 489s were required, and, thus, we are cancelling the *Tipton NALFs*.[4]

7. As for the *East Moline NALF*, there is no dispute that High Tech failed to timely file FCC Form 489 as required. Nonetheless, we accept its contention that the forfeiture should be adjusted downward for its "history of overall compliance" because Commission files do not contradict High Tech's assertion of such history. Importantly, also, we note that in assessing the forfeiture amount of $6,000, the Bureau followed the forfeiture guidelines established in the Commission's *1991 Forfeiture Policy Statement*. However, on July 12, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines. *See, United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994)*. Due to that decision, on reconsideration, the Commission has reassessed the forfeiture amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). In this case, we see that the offense, failure to file FCC Form 489, is as stated, *supra*, at paragraph 3, a relatively minor violation. In the case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994), the Commission found that for each violation of failing to file the form 489 (§22.9(b)(1)) of the Rules), a forfeiture of $2,000 was warranted. Considering the above factors, and the *AllCity* case, we find that a forfeiture of $2,000, for the failure to file a form 489, is appropriate in this case as well. However, due to the fact that High Tech voluntarily disclosed its failure to file the form 489, and that it did file the form as soon as it realized its mistake, we hereby reduce the forfeiture to $1,000 as we did in *AllCity*. Then, considering these particular factors, and the fact that the administrative costs of pursuing a forfeiture could well exceed the benefits to the Commission, we have determined it to be in the best interests of the Commission to dismiss this case against High Tech altogether.

## IV. CONCLUSION AND ORDERING CLAUSES

8. Based upon the foregoing, we are cancelling the *Tipton NALFs* and the *East Moline NALF*.

9. Accordingly, IT IS ORDERED that the Consolidated Request for Rescission or Reduction filed by High Tech Communications of Iowa, Inc. (now, High Tech Communications Corp. of Iowa) in the captioned proceeding IS GRANTED.

10. IT IS FURTHER ORDERED that the Notice of Apparent Liability for Forfeiture, File No. 316MS0008, IS CANCELLED.

11. IT IS FURTHER ORDERED that the Notice of Apparent Liability for Forfeiture, File No. 316MS0012, IS CANCELLED.

12. IT IS FURTHER ORDERED that the Notice of Apparent Liability for Forfeiture, File No. 316MS0011, IS CANCELLED.

13. IT IS FURTHER ORDERED that a copy of this Order BE SENT to High Tech Communications Corp. of Iowa (formerly, High Tech Communications of Iowa, Inc.), 10 Parsonage Road, Edison, New Jersey 08837, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

[4] High Tech filed two FCC Form 489s containing incorrect information because the forms stated that construction for the Tipton facilities was complete when, in fact, construction was not complete. Although this is an apparent "miscellaneous minor violation" of Section 22.9, *see Paging Network of Ohio, Inc.*, 7 FCC Rcd 7985 (Mobile Serv. Div. 1992), issuance of new NALFs to High Tech for this violation is prohibited by the statute of limitations. *See* 47 U.S.C. § 503(b).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Sacramento-Valley Limited Partnership — File No. 316MS0018

Notice of Apparent Liability for Forfeiture Penalty for Station KNKN219 in the Domestic Public Cellular Radio Telecommnications Service to serve RSA Market 345B, California 10 - Sierra

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 7, 1995; Released: August 18, 1995**

By the Chief, Enforcement Division:

## I. INTRODUCTION

1. Sacramento-Valley Limited Partnership (SVLP) has filed a Request for Rescission of the "Notice of Apparent Liability for Forfeiture" issued by the Chief, Mobile Services Division (MSD), Common Carrier Bureau, for $14,000. *Sacramento-Valley Limited Partnership*, 8 FCC Rcd 8526 (Mobile Serv. Div. 1993) (*NALF*). For the reasons discussed below, the request is granted.

## II. BACKGROUND

2. On June 12, 1991, the Commission granted authority for Contel Cellular of California, Inc. (Contel) to construct a facility at the Donner Ski Ranch (Ranch), which is located within the California Rural Service Area (RSA) 10-Sierra. Contel placed the Ranch facility into service on November 6, 1991. On November 20, 1991, the Commission granted an assignment of license for the Sierra RSA from Contel to SVLP, which was consummated on December 31, 1991. PacTel Cellular (PacTel) is the general partner of SVLP.

3. On August 24, 1992, PacTel informed the Commission that despite Contel's having filed an FCC Form 401, which was approved in June 1991, and which included the ranch site, Contel had not filed FCC Form 489 notifying the Commission that construction had been completed and operations were to begin. PacTel further stated that the Ranch facility was not included on the Radio Station Authorization Form 463; i.e., the license issued by the Commission in July 1992. PacTel simultaneously filed a request for Special Temporary Authority (STA) to continue operation of the station pending action on FCC Form 401, filed September 9, 1992. The Commission granted the STA.

4. In the *NALF*, issued August 17, 1993, the MSD found that because SVLP commenced operation without timely filing FCC Form 489, it was in apparent violation of Sections 22.3 and 22.9(b)(1) of the Commission's Rules, and that SVLP's failure to file the FCC Form 489 until September 9, 1992, constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. In arriving at the $14,000 amount, the MSD used the Commission's *Policy Statement* on Forfeitures then in effect,[1] utilizing the base forfeiture amount for the violation and then adjusting the amount downward because the violation was relatively minor and because PacTel, on behalf of SVLP, voluntarily disclosed its failure to file the FCC Form 489.

## III. DISCUSSION

5. SVLP asserts that its relative lack of culpability was not considered. SVLP was not the licensee of the facility when the Form 489 should have been filed, and it had no knowledge that the form had not been filed. It also contends that as soon as the oversight was discovered, SVLP promptly brought the matter to the Commission's attention by seeking and obtaining a STA to continue operation of the station so that the public would not be denied service.

6. There is no dispute that SVLP failed to timely file a FCC Form 489 and, therefore, its culpability, albeit, the result of an asserted oversight, nonetheless was present. After issuance of the *NALF* and the filing of SVLP's Response, however, the *Policy Statement* was vacated on July 12, 1994, by the U.S. Court of Appeals for the D.C. Circuit in *United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994)*. Due to this decision, the Commission has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). In this case, we see that the offense, failure to file FCC Form 489, is as stated, *supra*, at paragraph 4, a relatively minor violation. In the case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994), the Commission found that for each violation of failing to file the form 489 (§22.9(b)(1)) of the Rules), a forfeiture of $2,000 was warranted. Considering the above factors, and the *AllCity* case, we find that a forfeiture of $2,000, for the failure to file a form 489, is appropriate in this case as well. However, due to the fact that SVLP voluntarily disclosed its failure to file the form 489, and that it took remedial action quickly, we reduce the forfeiture to $1,000 as we did in *AllCity*. Then, considering these particular factors, and the fact that the administrative costs of pursuing a forfeiture could well exceed the benefits to the Commission, we have determined it to be in the best interests of the Commission to dismiss the case against SVLP altogether.

[1] Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993).

### IV. CONCLUSION AND ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the Request for Rescission filed by SVLP in the captioned proceeding IS GRANTED.

8. IT IS FURTHER ORDERED that the Notice of Apparent Liability issued to SVLP IS DISMISSED.

9. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Sacramento-Valley Limited Partnership, 1275 Pennsylvania Ave., N.W., Suite 400, Washington DC 20037, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Teton Communications Incorporated — File No. 63500-92-5-BFW

Notice of Apparent Liability for Forfeiture Penalty for Station KNKD376 in the Public Land Mobile Services at Idaho Falls, Idaho

## MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

**Adopted: August 7, 1995; Released: August 18, 1995**

By the Chief, Enforcement Division:

### I. INTRODUCTION

1. Teton Communications Incorporated (Teton) has filed a Petition for Reconsideration (Petition) and a Supplement to its Petition (Supplement) of a Commission order[1] which granted in part and denied in all other respects Teton's request for cancellation of a Notice of Apparent Liability for Forfeiture (*NALF*) we previously had issued.[2] In this Order, we find no basis to grant Teton's request to cancel the imposed forfeiture, although we have decided to reduce the amount of the forfeiture on our own motion.

### II. BACKGROUND

2. On October 23, 1984, the Commission granted Teton authority to construct and operate base station facilities on frequency 152.09 MHz at Idaho Falls, Idaho. Teton constructed the facilities and commenced operation prior to the October 23, 1985, expiration date of its construction permit but did not file the required FCC Form 489 notifying the Commission of completion of construction of the Idaho Falls facilities.[3] Because no FCC Form 489 had been filed, the Chief, Mobile Services Division, notified Teton by letter dated June 27, 1991, that its authorization for Station KNKD736 had expired.[4] On July 26, 1991, Teton filed a petition for reconsideration of that determination and a request for Special Temporary Authorization (STA) to continue to operate Station KNKD736 pending Commission action on an application for reinstatement of the expired authorization, which was filed with the STA request. Teton's authorization was reinstated after reconsideration. *Public Notice*, Mimeo No. 20112 (released Oct. 8, 1991) (*Reinstatement Public Notice*). The *NALF* was issued on March 19, 1992.

3. In the *NALF*, the Commission found that because Teton commenced operation without timely filing FCC Form 489, it was in apparent violation of Section 22.9(b)(1) of the Commission's Rules and that Teton's operation of the facility until July 26, 1991, constituted willful and continuing conduct within the terms of Section 503(b) of the Communications Act (the Act). Pursuant to the Policy Statement in effect at the time,[5] the base forfeiture amount for failing to file required forms was $30,000, but the forfeiture was adjusted downward to $15,000 because of the finding that failing to file an FCC Form 489 is a relatively minor violation.

4. Teton filed a petition requesting cancellation of the $15,000 forfeiture. We denied the petition in the *Teton Order*, rejecting Teton's argument that the NALF was inconsistent with the *Reinstatement Public Notice*. We stated in the *Teton Order* that the *NALF* pointed out that: (1) Teton constructed its facilities but began operating without timely filing FCC Form 489; and (2) the *NALF* was issued because of the apparent Section 22.9(b)(1) violation, not for the apparent expiration of Teton's authorization. *Teton Order*, 8 FCC Rcd at 591. We rejected Teton's argument that it did not intend to do any unlawful act or omission and, thus, did not "repeatedly" engage in the act which resulted in the forfeiture, by citing the Act's definition of "repeated" in Section 312(f)(2) of the Act, and observing that the definition applies to Section 503(b) of the Act as well. *Id.* at 591-92.

5. Rejecting Teton's claim that the *NALF* could not be issued for not filing more than five years before issuance of the *NALF*, we said that Teton's violation continued every day, beginning when it first commenced operation (sometime before October 23, 1985) to at least July 26, 1991 (when it filed its STA request). *Id.* at 592. While recognizing that part of that period of violation fell outside the statute of limitations, we nonetheless pointed out that the *NALF* was not issued for Teton's failure to file the FCC Form more than five years prior to issuance of the *NALF* but, rather, was timely issued and, thus, not violative of the statute of limitations because it was issued within one year of July 26, 1991, the date on which Teton filed for an STA and reinstatement. *Id.* We also rejected Teton's assertions that it could not be expected to maintain a copy of the FCC Form 489 and that because there was no FCC Form 489 on file with the Commission, such fact does not establish Teton's failure to file one. We stated that our having no record of the FCC Form 489 on file was *prima facie* evidence that Teton never filed the Form and that not only

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[1] *Teton Communications Incorporated*, Memorandum Opinion and Order, 8 FCC Rcd 591 (1993) (*Teton Order*).

[2] *Teton Communications Incorporated*, Notice of Apparent Liability for Forfeiture, 7 FCC Rcd 1989 (1992).

[3] Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

[4] The Common Carrier Bureau also issued a public notice listing the proposed deletion of Teton's expired authorization. *Public Notice*, Mimeo No. 13752 (released July 1, 1991).

[5] *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*1991 Forfeiture Policy Statement*), *recon. denied*, 7 FCC Rcd 5339 (1992).

was it in Teton's best interests to maintain a copy, it was required to retain and post its authorization,[6] pursuant to Sections 22.201(a) and (b) of the Rules. *Id.*

6. Additionally, we rejected Teton's arguments that the *1991 Forfeiture Policy Statement* and *NALF* violated the U.S. Constitution's Eighth Amendment prohibition against excessive bail and fines or cruel and unusual punishment. In this regard, we pointed out that the *Policy Statement* and *NALF* involved civil regulatory functions of the Commission, not criminal law functions. We also said the base forfeiture amount applied to Teton was not excessive and, moreover, the *1991 Forfeiture Policy Statement* and *NALF* did not violate the Constitution's Article I, Section 9, Clause 3 *ex post facto* prohibitions, pointing out that: (1) when Congress amended the Act in 1989 to increase substantially the maximum amounts of forfeitures that could be imposed under Section 503(b) and other sections of the Act, Teton was still operating its station with no FCC Form 489 on file; (2) licensees were placed on notice by the 1989 statutory increases in the Commission's Section 503(b) forfeiture authority that violation of the Act or Commission Rules could be subject to substantial forfeitures; (3) the *1991 Forfeiture Policy Statement* only proposed flexible guidelines for assessing forfeitures after the statutory Section 503(b) increases; and (4) the *NALF* followed those guidelines regarding the proposed amount. *Id.* Furthermore, we found nothing supporting Teton's claim of voluntary disclosure of the failure to file the FCC Form 489 because it filed for an STA and an application for reinstatement. As for Teton's claim of "history of overall compliance," we found nothing in the record contradicting Teton's assertion and, thus, applying the relevant downward adjustment criterion contained in the *1991 Forfeiture Policy Statement*, we reduced the forfeiture to $9,000. *Id.*

## III. PETITION FOR RECONSIDERATION

7. Teton requests reconsideration of the *Teton Order*, claiming that the Order raises issues for which Teton had inadequate notice to respond, is "impermissably [sic] broad and goes beyond the locus of the controversy ..., and bootstrap[s] arguments ... neither relevant nor material ...." Petition at 1. According to Teton, because the *NALF* clearly stated that Teton was found liable only for allegedly failing to file an FCC Form 489 in 1985, the Commission cannot claim in the *Teton Order* that Teton was found liable for unauthorized operation because unauthorized operation was not a subject of the *NALF*. In support, Teton points out that the *NALF* used the $30,000 base forfeiture amount for failing to file required information and did not use the $80,000 base forfeiture amount for unauthorized operation. Teton claims that although the *NALF* contained dicta saying that if the form was not filed, Teton might have been engaging in unauthorized operation, "dicta is not decision." Teton argues that the Commission is not permitted to use this dicta to justify the *Teton Order*. Consequently, Teton contends that because the allegation related solely to an act or omission alleged to have occurred in 1985, it thus follows that the one-year statute of limitations applies, and Teton cannot be found liable for any forfeiture. *Id.* at 5.

8. Teton also argues that it has rebutted the Commission's *prima facie* evidence that a violation occurred by "Teton's informed statements, with personal knowledge." *Id.* It also claims that although the FCC Form 489 was to be included as part of Teton's station records, such statement, while true, is not relevant because Teton has been charged with failing to file a form but not charged with failing to maintain proper station records. Teton further reiterates its *ex post facto* arguments, saying that the alleged failure to file an FCC Form 489 occurred in 1985, and the Commission's statutory authority to impose a fine greater than $2,000 did not exist until 1989. It adds that the Commission did not address whether the forfeiture was consistent with the Commission's acts in previous decisions and that the Commission did not rebut Teton's *prima facie* evidence that the forfeiture was arbitrary and capricious under any circumstances. Teton's Supplement proffers that the Commission should review the Supreme Court ruling in *Austin v. United States*, 113 S. Ct. 2801 (1993) (*Austin*), a copy of which Teton appended to its Supplement, and then should vacate the *NALF* in light of *Austin*. (Teton provides no arguments in asserting the applicability of *Austin*.)

## IV. DISCUSSION

9. Contrary to Teton's arguments, the *NALF* did not find Teton liable only for failing to file the FCC Form 489; the *NALF* specifically stated that, "Teton commenced operation without timely filing FCC Form 489 with the Commission...." *NALF*, 7 FCC Rcd at 1989. As previously mentioned[7] the *Revision and Update of Part 22* specifically stated that, "A copy of the filed Form 489 and the license [for a construction permit] will constitute the operating authority." Simply put, if Teton did not file the FCC Form 489 when Teton began operating, Teton did not have operating authority, and, thus, each day that Teton operated without having filed the Form 489 constituted a continuing violation. Teton commenced operation sometime before October 23, 1985, and continued operating to at least the July 26, 1991, date when it filed its STA request without having filed the Form 489. We could have imposed a forfeiture for the unauthorized operation but instead we utilized a lower base forfeiture amount, *i.e.*, failing to file the Form 489.[8] Therefore, Teton's arguments regarding "dicta" in the *Teton Order* are misplaced. Moreover, Teton's statute of limitations argument that the *NALF* could not be issued for failing to file the FCC Form 489 more than five years before issuance of the *NALF* similarly is misplaced. The *NALF* was issued on March 19, 1992,

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[6] "A copy of the filed Form 489 and the license [for a construction permit] will constitute the operating authority." *Revision and Update of Part 22 of the Public Mobile Radio Service Rules*, 95 FCC 2d 769, 774 (1983), *recon. granted on other grounds*, 101 FCC 2d 799 (1985), *further recon. granted on other grounds*, 2 FCC Rcd 1798 (1987) (hereafter, *Revision and Update of Part 22*), *quoted in Teton Order*, 8 FCC Rcd at 592.

[7] Para. 5, note 6, *supra*.

[8] Pursuant to the base forfeiture amounts in effect under the *1991 Forfeiture Policy Statement* when the *NALF* was issued, the base amount for "operation without an instrument of authorization for the service" was $80,000; the base amount for "operation at unauthorized location" was $40,000. We emphasize that under the *1991 Forfeiture Policy Statement*, we could have issued the *NALF* for failure to file the FCC Form 489 *and* for unauthorized operation, which, of course, would have resulted in a much higher forfeiture amount.

which was within one year of the July 26, 1991, date that Teton still was operating without having filed the Form 489. As a result, issuance of the *NALF* did not violate the one-year statute of limitation period set forth in Section 503(b)(6) of the Act.

10. We disagree that Teton has rebutted the Commission's *prima facie* evidence that a violation occurred. The *Teton Order* pointed out that if Teton had complied with the retaining and posting requirements of Sections 22.201(a) and (b) of the Rules, Teton could have rebutted the presumption that it never filed the FCC Form 489. Teton, however, has not rebutted the presumption. Regarding Teton's reiteration of its *ex post facto* arguments, again we point out that Teton's failure to file the Form 489 when it commenced operation was a continuing violation which continued after issuance of the *1991 Forfeiture Policy Statement*. As to Teton's assertion that the *Teton Order* did not address whether the forfeiture was consistent with previous decisions, we find that the assertion was not raised by Teton earlier. Notwithstanding Teton's assertion, however, we point out that the forfeiture was consistent with previous decisions. *See, e.g., Paging Network of Los Angeles, Inc.*, 8 FCC Rcd 1702 (1993), *response pending* (filed Apr. 5, 1993), wherein the same base forfeiture amount for failing to file required forms was used. Moreover, we rebutted Teton's claim that the forfeiture was arbitrary and capricious by indicating that it followed the *1991 Forfeiture Policy Statement* guidelines, which were implemented after Congress amended the Act to authorize higher permissible maximum amounts of forfeitures.

11. Finally, we dismiss the Supplement filed by Teton because the filing violates our Rules as untimely.[9]

12. Importantly, we note that on July 12, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated the forfeiture guidelines in the Commission's *1991 Forfeiture Policy Statement. See, United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir.1994)*. Therefore, on reconsideration, the Commission has reassessed the amount pursuant to the statutory guidelines set forth in Section 503 of the Act, 47 U.S.C.§503(b)(2)(D). In particular, Section 503(b) of the Act requires that the Commission "take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require." 47 U.S.C. §503(b)(2)(D). In this case, we see that the offense, failure to file FCC Form 489, is as stated, *supra*, at paragraph 3, a relatively minor violation. However, Teton failed to submit this form for more than six years, until the Commission gave Teton notice that its authorization had expired. In the case, *AllCity Paging, Inc.*, 9 FCC Record 6485 (1994), the Commission found that for each violation of failing to file the form 489 (§22.9(b)(1) of the Rules), a forfeiture of $2,000 was warranted. Considering the above factors, and the *AllCity* case, we find that a forfeiture of $2,000, for the failure to file a form 489, is appropriate in this case as well. Therefore, we are reducing the forfeiture imposed upon Teton to $2,000.

## V. CONCLUSION

13. Although we conclude that there is no basis upon which to grant Teton's request for reconsideration and vacation of the *TetonOrder*, on our own motion we are reducing the forfeiture to $2,000 as reflective of the statutory guidelines set out in the Act at 47 U.S.C. §503(b)(2)(D).

## VI. ORDERING PARAGRAPHS

14. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Teton Communications Incorporated in the above-captioned proceeding IS DENIED.

15. IT IS FURTHER ORDERED that the Supplement to Petition for Reconsideration filed by Teton Communications Incorporated IS DISMISSED.

16. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), that Teton Communications Incorporated SHALL FORFEIT to the United States the sum of two thousand dollars ($2,000) for violation of Section 22.9(b) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

17. IT IS FURTHER ORDERED that if the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

18. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Teton Communications Incorporated by Certified Mail, Return Receipt Requested.

[9] *See* Section 1.106(f), 47 C.F.R. § 1.106(f). In any event, Teton does not attempt to make any showing regarding the applicability of *Austin* to the facts here. Notwithstanding Teton's procedural defect and non-showing, we nonetheless find *Austin* inapplicable. That case involved a man whose mobile home and auto body shop were forfeited after a one-count cocaine conviction; the Supreme Court held that such civil forfeitures fall within the constitutional prohibition against excessive fines and rejected Department of Justice arguments that the Eighth Amendment does not apply to property forfeited in civil proceedings. Although tied to criminal activity, the Court said that forfeiture is a civil claim essentially brought against the property, not the person who might have engaged in wrongdoing, and remanded the case to consider if the forfeiture was constitutionally excessive. Neither Teton's Petition nor Supplement provides any support establishing an unconstitutionally excessive forfeiture and Teton has been, and is being accorded due process, *i.e.*, a chance to object to the *NALF* prior to ultimate resolution of this proceeding before paying, whereas the *Austin* property was automatically confiscated without Austin's being able to first object.

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of:

CONTINENTAL CABLEVISION, INC.
OF MICHIGAN

Appeal of Local
Rate Orders of City of
Westland, MI

## CONSOLIDATED ORDER

**Adopted: March 3, 1995 Released: March 6, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. By this Order, we consolidate two proceedings into one and rule on the merits in each proceeding. In deciding this appeal, the Bureau has reviewed all the pleadings filed in each of the separate proceedings. We have determined that the two proceedings are sufficiently similar and related to one another to justify the joint resolution of all the issues raised by each of the concerned parties in one consolidated proceeding.

2. Continental Cablevision of Michigan, Inc. ("Continental"), the franchisee in the above-referenced proceedings, filed with the Commission on April 6, 1994 an appeal of the local cable rate order adopted by the City of Westland, MI ("the City") on March 7, 1994. That rate order established Continental's basic service tier rates and associated equipment and installation rates, and ordered corresponding refunds dating back to September 1, 1993.[1] The City did not file any opposition.

3. On November 4, 1994, Continental filed with the Commission an appeal of a second local rate order adopted by the City on October 24, 1994. In this second rate order, the City established rates for Continental's basic service tier for the period beginning May 15, 1994. Along with its November 4, 1994 appeal, Continental also filed a Request for Emergency Stay.[2] The City filed oppositions to both the November 4, 1994 appeal and request for stay. Continental filed a reply to the City's opposition to the appeal on November 28, 1994. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

4. Under our rules, rate orders adopted by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission does not conduct a *de novo* review, but instead will sustain the local authority's order as long as there is a reasonable basis for its decision.[4] The Commission

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992(" Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] Continental also filed, on December 30, 1994, a supplementary pleading advising the Commission of new precedent that it believed to be applicable to its November 4, 1994 appeal, citing New England Cablevision of Massachusetts, Inc. DA 94-1607 (Cab. Serv. Bur., released December 28, 1994).

[3] 47 C.F.R. § 76.944 (1993).

[4] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731 (1993) ("*Rate Order*"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992,

will therefore reverse a local authority's decision only if it is determined that the local authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a local authority's decision, it will not substitute its own decision but will instead remand the issue to the local authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

5. In the first appeal, Continental raises issues involving calculations in its FCC Form 393, which it submitted to justify its rates for the period of September 1, 1993 to May 14, 1994, and alleges that the City used an incorrect Department of Commerce GNP-PI statistic for the 3rd quarter of 1992 in setting Continental's benchmark rates on the Form 393. In the second appeal, Continental raises issues involving calculations in its FCC Form 1200, which it submitted to justify its rates for the period beginning May 15, 1994, and alleges that: (1) the City refused to allow Continental to correct errors made by Continental on its FCC Form 1200 which were discovered and brought to the City's attention prior to the adoption of the October 24, 1994 rate order; and (2) in the second local rate proceeding the City adopted and retroactively applied a "five day" rule to prevent Continental from making corrections to its FCC Form 1200. We consider each of these issues in turn.

## II. DISCUSSION

### A. City's failure to use the correct GNP-PI figure in its March 7, 1994.

6. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

7. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is

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MM Docket 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 ("*Third Recon. Order*").

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994) (*"Second Recon. Order"*), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393.

8. With respect to the calculation of the inflation factor on Line 123, Continental states that it restructured its rates on September 1, 1993 using the most current information available at that time. Continental claims that it could reasonably rely upon the third quarter 1992 GNP-PI inflation estimate as printed on Line 123 of Worksheet 1 of Form 393 (121.8), and that it was not required to adjust this figure to reflect updates or revisions made to that estimate by the Department of Commerce subsequently. The City contends that it applied the revised figure of 122.5 based on the Commission's instructions holding that the most recently available GNP-PI determination should be used when making the rate benchmark calculations rather than the 121.8.[9]

9. Generally, an operator should use the most recent, publicly available data applicable to the period on which the operator bases its Form 393 calculations.[10] Continental submitted its Form 393 to the City on November 10, 1993, but its rate calculations were based on data available on September 1, 1993, which is the date Continental revised its rates in response to our rules. Continental used the estimated figure for the third quarter 1992 GNP-PI which was 121.8. In a *Public Notice* released on November 10, 1993, the Commission announced that the correct figure to be used in the Line 123 calculation for the third quarter 1992 GNP-PI figure is 122.5, not 121.8.[11] Subsequently, in the *Third Recon. Order*, the Commission stated that operators whose rate calculations are otherwise accurate were not required to adjust their rates simply because of the use of then-current data.[12] When an operator's rates are not justified and must be recalculated for reasons other than the use of then-current data, the operator will be required to make the necessary recalculations and use the updated data in doing so.[13] In the present appeal, the City does not dispute that Continental's rates are justified using the "then-current" GNP-PI figure of 121.8. Accordingly, the City should not require Continental to adjust its rates to reflect the revised GNP-PI figure of 122.5. We remand this issue to the local franchising authority for resolution in accordance with the terms of this Order.

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[9] City of Westland's Opposition to Appeal ("Opposition") at 4. *See also Public Notice* Questions and Answers on Completion of FCC Form 393 and Associated Filing, Question No. 9., (November 10, 1993) ("the most recently available GNP-PI should be used when making rate benchmark calculations.... The new number is 122.5." )

[10] *See Third Recon. Order*, 9 FCC Rcd at 4349-50; 47 C.F.R. § 76.922(b)(9); *Public Notice*, Cable Television Rate Regulation: Questions and Answers Relating to FCC Form 393, Question No. 10 (July 30, 1993); *Public Notice*, Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question No. 9 (November 10, 1993).

[11] *See Public Notice*, Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question No. 9 (November 10, 1993).

[12] *See Third Recon. Order* 4349; *see also* 47 C.F.R. § 76.922(b)(9); *see also Public Notice*, Questions and Answers on Cable Television Rate, Question No. 5 (released June 1, 1994).

[13] *Id.*

**B. The City's rejection of the revised Form 1200 in its October 24, 1994 order.**

10. FCC Form 1200 is the official form used by operators to determine whether their regulated rates for programming, equipment and installations are reasonable for the period beginning May 15, 1994. Through the use of Form 1200, an operator calculates three sets of figures: (1) the operator's actual March 31, 1994 rate; (2) the operator's March 31, 1994 benchmark rate; and (3) the operator's "full reduction" rate. An operator must first calculate its equipment and installation charges on Form 1205, and these changes are then subtracted from the operator's per-subscriber rates. Once the Form 1205 is completed, the operator uses the first part of Form 1200 to determine its provisional rates.[14] The operator is permitted to charge the larger of its provisional rates and its full reduction rates, the latter calculated in the second part of Form 1200.

11. The operator first completes Module A of the Form 1200 to calculate its actual March 31, 1994 total monthly regulated revenue, as well as a per-subscriber per-month average regulated revenue. Next, the operator completes Module B to calculate changes in external costs since the operator first became subject to regulation and Module C to calculate its March 31, 1994 benchmark rate on a per-subscriber, per-month basis. The March 31, 1994 actual rate is then compared to the benchmark rate, with the operator carrying forward the smaller of the two.[15] If the March 31, 1994 actual rate is the smaller of the two, the operator completes Module D, subtracting the per-subscriber equipment rate taken from Form 1205 and adding the external costs calculated from Module B. If the benchmark rate is the smaller of the two, the operator completes Module E, subtracting the per-subscriber equipment rate taken from Form 1205. Depending on which is used, either Module D or E establishes per-tier rates, which the operator carries forward into Module F, as its provisional rates.

12. In the second part of Form 1200, the operator derives its full reduction rate from its September 30, 1992 rates. The revised benchmark rules require cable systems to lower their regulated rates to a level that represents their September 30, 1992 rates, reduced by 17 percent, and then adjusted upward for certain permitted increases. The rate that regulated systems are allowed to charge under the revised rules is called the "full reduction rate." To compute this rate, in Module G, the operator calculates its September 30, 1992 total monthly regulated revenue, reduces it to a per-subscriber per-month average, reduces it by the 17% competitive differential, and adjusts upward by 3% to reflect the inflation from September 30, 1992 until September 30, 1993. In Module H, the operator then adjusts the results from Module G for changes that the operator has made since September 30, 1992 with respect to the number of subscribers, regulated channels, and satellite channels. In Module I, the operator subtracts the per-subscriber equipment rate from Form 1205, establishes per-tier rates, and adjusts the rates from Module H for changes in external costs. In Module J, the operator compares its provisional rates with its full reduction rates. Finally, the operator's maximum permitted rate, the greater of its provisional and full reduction rates, is entered into Module K.

13. Continental filed its original FCC

[14] The provisional rate is the program service charge component of the lesser of the benchmark rate as of March 31, 1994 and the adjusted actual March 31, 1994 rate.

[15] A small operator, i.e., an operator with 15,000 or fewer subscribers that is not affiliated with a larger operator, may keep its regulated revenue at its March 31, 1994 levels, and so is not required to complete its benchmark in Module C. Its provisional rate is determined by completion of Module D.

Form 1200 with the City on June 29, 1994.[16] On August 1, 1994, the City passed a resolution tolling the review period for an additional 90 days, to October 30, 1994. On September 7, 1994, the City mailed Continental a copy of a public notice which solicited comments and objections from interested parties and provided that such comments should be filed with the City on or before September 19, 1994. On September 19, 1994, an independent consulting firm hired by the City wrote the City regarding several errors in Continental's original FCC Form 1200. On September 29, 1994, the City held a public hearing regarding Continental's rate request. On September 30, 1994,[17] Continental submitted a revised FCC Form 1200 correcting Module C, line C5, Census Income Level.[18] Module C uses information about a cable system's characteristics, including household income data of residents in the franchising area, in calculating a benchmark rate. In its initial filing, instead of entering a figure on Line 5 for "per household" income, as required by the Form's instructions, Continental had used a lower "per capita" income figure in its original Form 1200, which produced a lower benchmark rate than if the correct per household income data is used.[19] Continental's September 30 submission contained a revised FCC Form 1200 correcting the error, along with a letter of explanation. On October 24, 1994, the City adopted its rate order based on the original FCC Form 1200 and rejected the amended FCC Form 1200.

14. Continental contends that the City had not closed the record on September 30, 1994, when the revised Form 1200 was submitted, and that the City impermissibly rejected Continental's revisions. It claims that both the City's consultant and Continental notified the City of the mistaken use of the per household income figure prior to the adoption of the rate order.[20] It also asserts that the City ignored the benchmark formula's required use of household income to derive the benchmark rate.[21] As support for its contentions, it notes that the City's consultant reviewed the revised rates and found that they were reasonable.[22] According to Continental, the reversal of the City's order would serve the public interest by upholding the integrity of the benchmark process.[23]

15. The City argues that franchising authorities must not only perform the mathematical review of an operator's submission, "but also provide meaningful public comment regarding the enormous profits that cable operators are reaping."[24] It asserts that it rejected Continental's amendment because interested parties could not have commented on it since the comment period had expired on September 19, 1994.[25] It characterizes Continental's correction as an attempt to circumvent public comment and implement a "huge rate

[16] *See* 47 C.F.R. § 76.922(b)(6).

[17] Continental and the City disagree over when the City received the amended Form 1200. Continental claims that the City received the form on September 28, 1994. The City claims that it received the Form 1200 on September 30, 1994 and attached an affidavit from its clerk in support of its claim. *See Opposition*, Exhibit E at 3.

[18] In Module C, operators calculate their benchmark regulated revenue per subscriber as of March 31, 1994. To calculate the benchmark, operators must input various variables from the franchise area such as channels per tier, subscribers per tier, and census level income (line C 5).

[19] *See* FCC Form 1200 Instructions at 16.

[20] *Appeal* at 2-3 ("Appeal No. 2").

[21] *Id* at 6.

[22] *Id. See also* Appeal No. 2, Exhibit E, at 7.

[23] Appeal No. 2 at 10.

[24] Opposition at 15.

[25] Opposition at 14.

increase."[26] The City argues that Continental was served with a copy of the City's rules regarding public comment and should have met the closing date for comments.[27]

16. If a franchising authority elects to toll the deadline for review of a cable operator's rate filing, as the City did here, the solicitation and collection of additional information during the review period will be at the franchising authority's discretion.[28] However, where the franchising authority is unable to rule on the reasonableness of a proposed rate, the tolling order should provide the cable operator an opportunity to cure any deficiencies in its original filing.[29] Under such circumstances, a local franchising authority should accept for review amended or supplemental filings to an original FCC Form 1200 if an operator submits the new information within a reasonable period of time and presents an adequate explanation for the change or changes.[30]

17. In this instance, the City rejected Continental's revised filing because the City's public comment period had expired. The City's notice requested comments on Continental's Form 1200 by September 19, 1994. Continental did not file its amended form until September 30, 1994. However, the amendment was filed three weeks prior to the release of the local order and within the tolling period which extended the review period to October 30, 1994. Operators should be allowed to correct data deficiencies under such circumstances. Continental had the responsibility to explain and justify the information contained in its FCC Form 1200, as well as in any modifications to its original filing.[31] When Continental refiled its FCC Form 1200, it fulfilled this responsibility by attaching a cover letter explaining why the changes were necessary. Because Continental explained that the revisions were to cure a deficiency, the nature of which the City does not challenge, the City should have accepted the revised form for review.[32] We find that the City's rejection of Continental's revision on the basis of untimeliness was unreasonable. Accordingly, we remand this issue to the City so that it can enter a ruling consistent with these findings.

### C. The City's adoption of the "five day" rule in its October 24, 1994 order.

18. On October 24, 1994, at the same time that it issued its rate order, the City adopted a new rule requiring any corrections to rate data

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[26] *Id* at 15-16.

[27] *Id* at 14.

[28] *Report and Order* at 5709 ("... To toll the effective date of the proposed rates, the franchising authority must issue a brief order, within the initial 30-day period, explaining that the franchising authority needs additional time to review the proposed rates. During these 90 or 150-day periods, the franchising authority *can* solicit additional information from the cable operator, if necessary, and consider the views of interested parties." (emphasis added))

[29] *See* 47 C.F.R. § 76.933(b) and *Report and Order* at 5709, n. 311 ("If the franchising authority is unable to determine whether the proposed rate complies with the Commission's reasonable rate standard, then the order tolling the effective date of the proposed rate should explain why the franchising authority could not make such a determination. The order should also provide the cable operator an opportunity to cure any deficiencies in its original filing.")

[30] *See* 47 C.F.R. § 76.933(b) and *Report and Order* 5709, n.311.

[31] 47 C.F.R. § 937; *see also Third Recon. Order* 4346.

[32] In this case, Continental discovered an error and corrected it more than three weeks prior to release of the local order.

submitted by Continental to be resubmitted within five days of the initial filing date of the document to be corrected. Continental claims that the City retroactively applied the rule to bar Continental from correcting its original FCC Form 1200.[33] The City disputes Continental's assertion that it retroactively applied the rule to bar Continental's revised FCC Form 1200. It asserts that it disapproved the revised FCC Form 1200 because it was submitted after the public hearing was held and the notice and comment period had expired.[34]

19. Under the Commission's rules, appeals of local franchising authorities' ratemaking decisions that do not turn on whether a franchising authority has acted consistently with the 1992 Cable Act, or the Commission's rules regarding rate regulation, "may be heard in state or local courts."[35] Both the City's procedural rules regarding comment periods and the City's five-day rule are local rules, the validity of which should be tested in a local forum. However, if application of such rules is inconsistent with our procedural requirements, the local rules cannot be held valid.[36] Such is the case here. We have stated that a cable operator should be permitted to revise its data during the tolling period.[37] The five-day rule, to the extent that it unreasonably disallows operators' revisions of data permitted by our rules, is inconsistent with our regulations. Its application is especially troublesome here since Continental, in submitting the revised Form 1200, was responding to comments of the City's own consultant, which were themselves not available to Continental until after the five-day period would have run. For the same reasons, we find the City's argument regarding the expiration of the comment period unpersuasive. Continental's submission was made a full three weeks before release of the local order and was within the period set forth in the tolling order. The City has offered no reasonable explanation for refusing to accept the correction. Under the local rules, no corrections appear to be permissible after the City's review of, and public comment on, the Form 1200. While local authorities are permitted to enact rules regarding time limitations for filing amendments, such rules must allow operators a reasonable period to discover errors and make corrections. The City's rule does not do so. The restriction is unreasonable.[38] We remand this issue to the City for further consideration consistent with this finding.

VI. Ordering Clauses

20. Accordingly, **IT IS ORDERED**, that Continental Cablevision of Michigan, Inc.'s appeal of the City of Westland's local rate order regarding the issue of the City's use of an incorrect Department of Commerce GNP-PI statistic for the 3rd quarter of 1992 in setting Continental's benchmark rates for the period of September 1, 1993 through May 14, 1994 is **REMANDED** to the local franchising authority for resolution in accordance with the terms of this Order.

21. **IT IS FURTHER ORDERED** that Continental's appeal of the City's refusal to allow Continental to correct errors made by Continental on its FCC Form 1200 is **REMANDED** to the local franchising authority for

[33] Appeal No. 2 at 4.

[34] Opposition at 17.

[35] 47 C.F.R. §76.944(a).

[36] A franchising authority must be certified by the Commission in order to regulate the basic service tier. In order to regulate, the franchising authority must adopt regulations that are consistent with our regulations. *See* 47 C.F.R.§ 76.910.

[37] *See* note 32, *supra.*

[38] See 47 C.F.R. § 76.933 ("[A] franchising authority must have procedural laws or regulations applicable to rate regulation proceedings that provide a reasonable opportunity for consideration of views of interested parties.")

resolution in accordance with the terms of this Order.

22. **IT IS FURTHER ORDERED** that Continental's appeal of the City's adoption and retroactive application of a "five day" rule to Continental's attempted correction of its Form 1200 is **REMANDED** to the local franchising authority for resolution in accordance with the terms of this Order.

23. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

**FEDERAL COMMUNICATIONS COMMISSION**

Meredith J. Jones
Chief, Cable Services Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993

Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services

**FIRST REPORT**

**Adopted: July 28, 1995 Released: August 18, 1995**

**By the Commission:**

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## I. INTRODUCTION

1. CMRS, or "Commercial Mobile Radio Services," is a category of services that Congress created[1] to encompass all mobile telecommunications services that are provided for profit and make interconnected service available to the public (or to such classes of eligible users as to be effectively available to a substantial portion of

[1] The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 ("Communications Act") and codified at 47 U.S.C. §§ 153(n), 332(c)(1) (hereinafter, the "Budget Act").

the public, as specified by Commission regulation).[2] The creation of CMRS was one of several Congressional actions that have the effect of promoting the consistent regulation of similar mobile radio services. Congress also required the Commission to submit an annual report reviewing competitive market conditions with respect to CMRS.[3] This Report ("*Report*") is the first of the Commission's annual reports.

### A. Executive Summary

2. CMRS is a part of the telecommunications business that is undergoing major changes that have resulted in growing competition, convergence and popularity, all under a system of reduced regulation. Traditionally, CMRS was composed of discrete services that did not compete with each other to any significant degree, were used by relatively few customers, and were regulated in a traditional public utility manner by this Commission and most states.

3. Major change began in the mid-1980s with the first commercial offering of cellular mobile telephone service. Originally, in the 1970s, the Commission had planned to have only one cellular system, which would be operated by local telephone companies. But in 1981, to ensure competition in the cellular business, the Commission decided to license two competing cellular systems in every area. The Commission determined that one would be operated by a separate subsidiary of a local telephone company and the other would be totally unaffiliated with any local telephone company. At the time, no one predicted that the service would be as popular as it has become. The service has a ten percent penetration rate among American consumers. Cellular service in automobiles and via portable telephones has become a universally recognized business tool, and its providers have recently begun to target their marketing strategies towards the mass consumer market. Paging service has even more subscribers than cellular, and dispatch service has grown steadily in popularity among business and government entities.

4. The duopoly nature of cellular service made it less than fully competitive, however. Therefore, in the early 1990s, the Commission allocated 143 MegaHertz ("MHz") of spectrum, almost three times the spectrum allocation for cellular service, to create Personal Communications Services ("PCS"). The Commission is awarding licenses for PCS by auctions. In June 1995 the Commission issued two licenses of thirty MHz each for the most significant form of PCS, broadband PCS, in every locality in the country (except for three markets in which one license had already been awarded to a technical "pioneer").[4] Broadband PCS is expected to be available on a widespread basis by 1996 and the Commission's spectrum allocation provides sufficient spectrum to ensure at least three, and possibly as many as six, new competitors to the cellular carriers in each market. Broadband PCS will have many times the capacity of today's cellular systems and its offerors will be able to provide any mobile service that consumers demand, free of traditional classifications such as "telephone,"

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[2] *See* 47 C.F.R. § 20.3; *Implementation of Sections 3(n) and 322 of the Communications Act - Regulatory Treatment of Mobile Services, Second Report & Order* ("*Second CMRS R&O*"), 9 FCC Rcd 1411, 1425-42 (¶¶ 39-70) (1994). CMRS providers include "all cellular licensees, common carrier paging licensees and private carrier paging licensees . . . , all wide-area SMR providers and most SMR providers." *Id.* at 9 FCC Rcd at 1468 (¶ 139) (footnote omitted).

[3] Communications Act, 47 U.S.C. § 332(c)(1)(C).

[4] *See Public Notice, Auctions* (Mar. 13, 1995) and authorities cited *infra* note 90. The three "pioneer" licenses were issued to American Personal Communications (for Baltimore/Washington, D.C.), Cox (for Los Angeles), and Omnipoint (for New York City).

"dispatch," and "paging." Investors believe the prospects for broadband PCS are bright enough that they bid over $7 billion at the recent auctions. Already, the approach of broadband PCS appears to be influencing incumbent wireless providers to lower prices and increase features. The Commission's implementation of PCS is an example of regulation that promotes the private marketplace over government mandates, the most efficient use of the nation's natural resources (in this case, spectrum), and competition (with the attendant benefits for consumers of low prices, high quality, and innovation).

5. The Commission has also systematically removed regulatory barriers, thus allowing dispatch systems to provide mobile telephone service and vice versa. Other regulatory barriers were removed recently when the Commission forbore from regulating CMRS under several sections of Title II of the Communications Act[5] and pre-empted state regulation of entry into and rates for CMRS. This trend towards reduced regulation is continuing, as the Commission is considering the most efficient way to license wide-area dispatch systems that can compete on an equal footing with cellular service and PCS. Finally, the Commission recently licensed several satellite-based systems that, upon commencement of service in future years, may greatly increase the availability of CMRS that is provided by competing carriers and in the forms the Commission believes will meet consumer demand.

6. Under this system of increasing spectrum allocations and flexibility, CMRS has already become a significant part of the nation's economy. CMRS has shown steady growth[6] and double digit annual growth rates should be anticipated for CMRS during the next several years.[7]

7. The combination of these events is leading to several trends that are discernible from the data analyzed in this *Report*. First, the previously discrete categories of services within CMRS are beginning to compete with each other, and CMRS may become a single market for telecommunications for "people on the move." Second, it is predicted that the availability and popularity of CMRS should increase several-fold in the next few years. Third, with the Commission's spectrum allocations for PCS and satellite-based systems multiplying the amount of spectrum available for wireless services, prices to consumers and carriers' profits will be lower, entry by new competitors and services will be easier, and competitive forces will generally be much stronger than they have been in the cellular duopoly and elsewhere in CMRS.

8. The Commission believes that these trends all improve consumer benefits and should be encouraged. At the same time, the Commission will keep intact its regulatory authority to monitor the conduct of incumbent providers for such services as interconnection and resale,[8] to ensure that no abuse of market power occurs that could frustrate or delay the achievement of its goals.

* * *

[5] Communications Act, 47 U.S.C. §§ 201-29.

[6] *See* Tbl. 1.

[7] Last year, the cellular industry by itself added about 8 million subscribers. *Cellular Industry Hits Historic Landmark: One Out of 10 Americans Now Use Cellular, Total Subscribers Reach 25 Million Milestone*, Cellular Telecommunications Industry Association (CTIA) Press Release ("CTIA Press Release"), Feb. 24, 1995, at 3-4.

[8] *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Notice of Proposed Rulemaking*, CC Docket No. 94-54 (FCC 95-149) (Apr. 20, 1995).

9. This *Report* is organized in four parts. Because this is the Commission's first report, as a frame of reference, Part II describes the various forms of mobile services that exist today in this country or may be offered in the next few years. Most of these services are CMRS. Part II also describes private mobile radio services that are not CMRS. However, private mobile radio services could have some substitutability with CMRS or could be reclassified as CMRS in the future based on the type of service provided. Part III describes competition in CMRS, summarizing conclusions reached by the Commission and other governmental bodies in the past and making some additional tentative findings about CMRS competition. Part IV addresses administrative matters. Because the greatest amount of available data concerns cellular service, the sharpest focus of this *Report* pertains to it.

## II. MOBILE RADIO SERVICES

10. This *Report*, being the Commission's first on CMRS, begins with short factual descriptions of each major mobile radio service regulated by this Commission. Currently, there are over seventy-five million mobile radio users, most of which subscribe to CMRS providers.[9]

11. The common element of all mobile radio services is that they use a radio frequency or channel instead of a wire to communicate to and from one or more mobile locations, such as motor vehicles. Beyond that, there are many differences. This Section of the *Report* relates information about each major mobile radio service to the extent it is available. This Section focuses on the key aspects of each service that makes it competitive with or distinct from the others: the capabilities it gives the user (*e.g.*, one- or two-way voice communication, data transmission, *etc.*); the area(s) within which it is provided; the amount of spectrum (capacity) that is available for it; the number of companies that provide it and other basics of market structure; the nature and number of its users; basic facts about prices and rates; any federal and state regulation;[10] and the ease or difficulty of users changing suppliers and of new providers entering the business.

12. Of the mobile radio services described in this Section, the following are CMRS: cellular mobile telephone service, non-private paging service, SMRs that are interconnected to the public switched telephone network ("PSTN"), air-ground service, satellite systems for mobile communications, maritime service, and PCS. Not included within CMRS are SMRs that are not interconnected to the PSTN, and other private mobile radio services unless they are interconnected and offer commercial service.[11]

### A. Commercial Mobile Radio Services ("CMRS")

#### 1. Cellular Mobile Telephone Service

13. In 1975, the Commission allocated forty MHz of spectrum to the "Domestic Public Cellular Radio Telecommunications Service" for the

[9] CMRS encompasses approximately 25 million cellular subscribers, 25 million pagers, and 2 million SMR transmitters. Other mobile radio users include approximately 15 million private land mobile radio users.

[10] This discussion omits regulations affecting technical operation, safety, and other matters of marginal importance to competition.

[11] See authorities cited in note 2, *supra*. In addition, Congress has provided that systems that are currently classified as private, such as certain SMR systems (*see infra* paras. 51-55), shall remain so classified until August 10, 1996, whereupon they will be classified as CMRS. Budget Act, § 6002(c)(2)(B).

development of a nationwide cellular mobile radio communications system.[12] The Commission viewed this as an allocation for mobile radio systems with a high capacity to serve subscriber units by the coordinated reuse of a group of radio channels.[13] Cellular service to the public began in late 1983 and has achieved great popularity. Each year, cellular subscriber growth has approached or exceeded fifty percent[14] -- an amazing record of sustained growth. Approximately twenty-five million[15] persons subscribe to cellular service. The Commission recently estimated that "[c]ellular service is expected to reach twenty percent penetration, or approximately 54 million customers, by the year 2000."[16] Service revenues totaled over $14 billion in 1994.[17] Table 1 shows the growth of cellular subscribers and revenues through 1994.

14. For licensing purposes, the Commission designated 734 markets, (306 Metropolitan Statistical Areas ("MSAs") and 428 Rural Statistical Areas ("RSAs")). One of the major early decisions made by this Commission was that cellular service would be competitively provided by two "facilities-based" carriers per market.[18] Since the Commission allocated an additional 10 MHz to cellular service in 1986, a total of fifty MHz has been allocated to cellular service, twenty-five MHz to each carrier.[19] In each market, the cellular system

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[12] *Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz, Memorandum Opinion & Order* ("*Docket No. 18262*"), 51 FCC 2d 945 (1975). Concerning the evolution of cellular service, *see* John Berresford, *The Impact of Law and Regulation on Technology: The Case History of Cellular Radio*, 44 BUS. LAW. 721 (1989).

[13] *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Notice of Inquiry and Notice of Proposed Rulemaking*, 78 FCC 2d 984 (¶ 2) (1980).

[14] *See* Tbl. 1.

[15] CTIA Press Release, *supra* note 7, at 1.

[16] *Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services; Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside* (continued...)

[16](...continued)
*the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, Third Report & Order* ("*Third CMRS R&O*"), 9 FCC Rcd 7988, 8017-18 n.89 (¶ 54 n.89) (1994).

[17] CTIA Press Release, *supra* note 7, at 2.

[18] *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report & Order*, 86 FCC 2d 469 (1981), *Memorandum Opinion & Order on Reconsideration*, 89 FCC 2d 58 (1982), *petition for review dismissed sub nom. United States v. FCC*, No. 82-1526, Slip Op. (D.C. Cir. Mar. 3, 1983) ("*Cellular R&O*"). Although the Commission had initially planned to license one cellular carrier in each market, which would be a local telephone company, the Commission soon afterward realized that two cellular carriers, splitting the spectrum, would foster a certain amount of competition. *See id.* at 474, 476.

[19] Initially, each cellular carrier was given 20 MHz. *An Inquiry Relative to the Future Use of the Frequency Bands 806-960 MHz and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz, First Report & Order and* (continued...)

using frequency Block B was initially affiliated with a local "wireline" telephone company and the system using Block A (the "nonwireline" system) was licensed to an entity unaffiliated with the local telephone company.[20]

15. Initially the Commission issued licenses using comparative hearings and encouraged competing applicants to settle their differences and form partnerships. In 1982, Congress provided the Commission with the authority to award licenses by lottery.[21] The Commission's initial methods of licensing, which are not as efficient as auctions, had at least two important consequences. First, many licenses are currently held by partnerships that resulted from settlement agreements.[22] Second, because lotteries are not necessarily won by the applicants that value the licenses most, many licenses, particularly for Block A, were initially won by persons who later sold their licenses to more experienced telecommunications providers for substantial sums of money.[23]

16. Until 1987, the Commission required that all cellular systems and telephones meet a specific analog technical standard.[24] This specificity, coupled with the Commission's requirement that cellular telephones be capable of using either licensee's frequencies, made it easy for subscribers to switch carriers without having to buy new equipment, thus enhancing competition between carriers. In 1988, the Commission relaxed

[19](...continued)
*Second Notice of Inquiry, summarized in* 35 Fed. Reg. 8644 (June 4, 1970); *Second Report & Order*, 46 FCC 2d 752, 757 (1974), *on reconsideration, Memorandum Opinion & Order*, 51 FCC 2d 945 (1975), *aff'd sub nom. NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). Because the demand for cellular service was greater than expected, in 1986 the Commission allocated each cellular carrier an additional 5 MHz. *Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems - Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use - Amendments of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, Report & Order*, 2 FCC Rcd 1825, 1826, 1828 (¶¶ 10, 25) (1986).

[20] As originally licensed by the Commission, one cellular system in each area was a corporate affiliate of a local "wireline" telephone company and the other was not. In 1986, the Commission and the courts allowed an affiliate of a local telephone company in one area to buy the "non-wireline" system in another area. *James F. Rill, Order on Reconsideration*, 1 FCC Rcd 918 (1986); *United States v. Western Electric Co.*, 1986-1 Trade Cas. ¶ 66,987 (D.D.C. 1986). This provoked a wave of acquisitions of "non-wireline" systems by non-market telephone companies. *See, e.g., Applications of Metromedia Co. for Consent to Transfer of Control of Metromedia Co., Memorandum Opinion & Order*, 1 FCC Rcd 1227 (1986). This trend towards concentration of the cellular business in the hands of telephone companies was somewhat blunted when, in 1992, Pacific Bell divested its cellular properties to a new entity, AirTouch.

[21] H.R. Rep. No. 765, 97th Cong., 2d Sess. (1982). *See also Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, Second Report & Order*, 93 FCC 2d 952 (1983).

[22] *See, e.g., Chicago SMSA Ltd. Partnership, Memorandum Opinion & Order*, 95 FCC 2d 538, 540 (1983); *Advanced Mobile Phone Service, Inc., Memorandum Opinion & Order Granting Application*, 93 FCC 2d 683, 690 (1983).

[23] *See generally, Implementation of Section 309(j) of the Communications Act Competitive Bidding, First Report & Order*, 9 FCC Rcd 7373 (1994).

[24] *Cellular R&O*, 86 FCC 2d at 505-09 (1981).

its requirements and permitted cellular carriers to adopt new technologies, provided the carriers continued to support the current technical standard.[25] This decision encouraged the development of new digital equipment that should enable the industry to increase capacity of existing channels to serve an ever-increasing number of customers on a finite amount of spectrum.

17. Although an individual cellular carrier may hold licenses in many areas, each customer takes service from a carrier with a license for a specific MSA or RSA. While some wide-area service options exist,[26] they are relatively rare. However, for a fee, all cellular customers may use their cellular telephones in markets other than their "home" market through a service known as "roaming."[27] This effectively makes cellular service available nationwide to all customers.

18. A cellular call is initiated by a cellular subscriber when he or she pushes the "send" button on a cellular telephone to place a call. The cellular telephone emits a radio signal on a specific frequency (channel) and automatically transmits information identifying the subscriber, the specific cellular telephone, and the telephone number the subscriber is trying to reach. Nearby cellular base stations (each consisting of an antenna, transmitter, receiver, and other equipment) receive this signal. One base station sends the call to the nearest Mobile Telephone Switching Office, where it is determined, among other things, if the call was placed by a valid subscriber, which base stations will handle the call, and on which of several radio channels the telephone call should be handled. The base station broadcasts information to the subscriber's telephone about which channel the telephone call will be placed on, and ultimately connects the call through the PSTN.

19. A typical cellular system consists of many "cells," each of which contains a base station that provides coverage over a particular geographic service area. Each system's cells are connected to each other and to the PSTN by facilities that are either leased from a local telecommunications carrier or are owned and operated by the cellular system licensee itself. As the call by the subscriber progresses, the base station checks to see if the radio signal remains adequate. If the subscriber moves far enough away from the base station, or if there are obstructing buildings or poor weather conditions, the signal will grow weak. Rather than end the call, the base station hands-off the call to a different frequency on another, closer or more suitable, base station, thus allowing the call to continue.

20. A call from outside the cellular system to a cellular subscriber begins with a caller dialing the telephone number of a cellular subscriber. The PSTN recognizes that the exchange is associated with a particular cellular carrier and routes the call to that carrier's network. The cellular network knows, via a database, if the called party's number is a valid subscriber's telephone number. If it is, base stations covering the entire cellular network emit a signal on the designated control channel with the cellular subscriber's unique identifier. If the user has the cellular telephone turned on, the telephone will receive and respond to

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[25] *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, Report & Order*, 3 FCC Rcd 7033 (1988).

[26] *See, e.g., Application of Craig O. McCaw, Memorandum Opinion & Order*, 9 FCC Rcd 5836, 5852 n.55 (¶ 23 n.55) (1994), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995), *petition for reconsideration pending on other grounds* ("*Craig O. McCaw*") (cellular carrier offered an option named the "City of Florida," in which customers could have flat-rate calling on all its systems in one state).

[27] Roaming agreements between the "home" carrier and the "serving" carrier are required. Such agreements are common between carriers.

that signal. From that point on, the call is the same as a subscriber-initiated call.[28]

21. Initially, the primary use of cellular service was for voice communications from cars. Currently, however, about half of new service is for portable (hand-held) cellular telephones.[29] One of the major industry trends has been towards lower cost and lighter weight hand-held cellular telephones.[30] In addition, the capabilities of cellular systems have improved significantly, making data and facsimile communications increasingly common.

22. The Commission does not regulate cellular prices.[31] The basic charges for cellular service usually consist of a flat monthly fee for "access" to the cellular system (sometimes including a number of minutes of "free" usage), per minute charges for usage during "peak" day periods, and per minute charges for "off peak" night and weekend usage.[32] Carriers typically offer a variety of pricing packages. For example, one package might be aimed at people who expect to use their cellular telephone for emergencies only. Such a package would have a relatively low monthly fee and high per minute charges. Another package might be aimed at people who want to use their cellular telephones a substantial amount each month. That package will probably have a high monthly access charge in exchange for a large number of "free" minutes or a low per minute charge. Many packages require customers to sign a contract for one year or more.

23. Cellular pricing has begun to reflect in part the impending introduction of PCS.[33]

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[28] *See* GEORGE CALHOUN, *Digital Cellular Radio* (1988), for a fuller explanation of cellular technology.

[29] HERSCHEL SHOSTECK ASSOCIATES, LTD., 11 *The Retail Market of Cellular Telephones* 3, at Fig. 7.2 (Dec. 1994) (*"Shosteck Cellular"*).

[30] Small pocket devices and miniature wrist models are currently being tested. Bart Ziegler, *Telecommunications: Future Phones Anytime, Anywhere: The Phone in the Dishwasher and Other Predictions on Where Technology is Heading*, WALL. ST. J., Mar. 20, 1995, at R18.

[31] Some states have exercised their jurisdiction to regulate cellular entry, rates, and terms and conditions of service. More recently, however, Congress generally prohibited states from regulating CMRS entry and rates, except pursuant to special authority granted by this Commission. 47 U.S.C. § 332(c)(3). The Commission recently denied such authority. *See, e.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates, Report & Order,* PR Docket No. 94-105, (FCC 95-195) (May 19, 1995) (*"California State Petition R&O"*), *reconsideration denied, Order on Reconsideration*
(continued...)

[31](...continued)
(FCC 95-345) (Aug. 9, 1995).

[32] For a discussion of the price levels and structure of cellular service, *see* GEN. ACCT'G OFF. REP., *Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry*, GAO/RCED-92-220, at 22-23 (July 1992).

[33] *See, e.g., Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS*, COMM. DAILY, Apr. 24, 1995. Herschel Shosteck believes that "[t]ariff declines also reflect the initial steps of carriers to counter the impending competition from PCS." *Id. See also* Mike Mills, *Wireless: The Next Generation*, WASH. POST, Feb. 20, 1995, at Wash. Bus. 1 ("most major cellular carriers across the country . . . have been busy neutralizing their future competition by adopting most every perceived advantage that PCS was supposed to bring. Cellular prices have been dropping recently in anticipation of the competition. Phones continue to get lighter and their batteries last longer. New 'wireless data' applications already allow instant credit card verifications . . . . And signal quality is
(continued...)

Cellular carriers are reducing prices and beginning to offer packages that resemble expected PCS offerings.[34] For example, Bell Atlantic offers a package with a low monthly fee ($14.99) and relatively modest per minute charges (thirty-five cents) for calls made in, and received from, a relatively small geographic area. However, calls outside the defined area are significantly more expensive (ninety-nine cents per minute).[35]

24. While prices may vary substantially from city to city,[36] a typical monthly cellular bill in 1994 was approximately $60.[37] As discussed in the preceding paragraph, cellular service prices have been decreasing, partly in anticipation of the arrival of PCS. The Commission expects cellular prices to continue to decline.[38]

25. In addition to the cost of cellular service, subscribers must also buy or lease cellular equipment (generally a carphone or portable hand-held cellular telephone). Purchase prices for cellular telephones range from approximately $100 to $500.[39] Bundled sales whereby cellular telephones and service are purchased together are very common,[40] though. This, in turn, makes estimation of the cost of a stand-alone telephone difficult in many cases.

26. As of February 1995, there were approximately 1,581 cellular systems in the United States.[41] Roughly sixty percent of cellular customers are served by systems that are controlled

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[33](...continued)
better than ever").

[34] Another effect that the approach of PCS is having on cellular carriers is to hasten the conversion of cellular networks from analog to digital technology. Digital technology, though relatively expensive, is efficient, and is the technology with which PCS will enter the market. *See infra* para. 47.

[35] Mike Mills, *At Bell Atlantic, Bringing Wireless to the Masses*, WASH. POST, Apr. 24, 1995, at WASH. BUS. 9.

[36] *See* Comments of CTIA, Affidavit of Professor Jerry A. Hausman, *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, Tbl. 1, at 4 (Sept. 9, 1994).

[37] *Mid-Year Results Show Wireless Customers Near 20 Million Mark; Monthly Bills Drop*, Cellular Telecommunications Industry Association (CTIA) Press Release, Sept. 6, 1994. Also, Tbls. 3, 4, and 7 provide some data on cellular prices in the State of California and for 29 large markets.

[38] Indeed, one analyst predicts that cellular prices will decrease by about six to eight percent during the next two years, and that if PCS deployment is accelerated, rates could drop even more precipitously in 1996. *Price Elasticity in Cellular Will be Tested by Greater Competition*, WIRELESS BUS. AND FIN., Mar. 29, 1995.

[39] *See Shosteck Cellular*, at Fig. 6.1, and Fig. 14.4.

[40] *Bundling of Cellular Customer Premises Equipment and Cellular Service, Report & Order*, 7 FCC Rcd 4028 (1992).

[41] Commission Cellular Database, Wireless Telecommunications Bureau. The number in the text above is greater than twice the number of license areas stated in paragraph 14, because some licensees chose not to serve their full licensed areas. The Commission's rules include provisions for "fill-ins" by other persons in such circumstances. *See generally, Applications of McElroy Elec. Corp., Memorandum Opinion & Order*, File # 01758-CL-MP-88 (Mar. 23, 1995). Thus, within some Commission-defined areas, there are more than two systems, although in any one place there are only two systems.

by wireline telephone companies.[42] As of the middle of 1994, the top five cellular operators, measured by reported subscribers, were McCaw Cellular (acquired by AT&T in September 1994), GTE/Contel, BellSouth, Southwestern Bell, and Bell Atlantic.[43] Two major horizontal consolidations involving telephone-affiliated cellular companies are underway.[44]

27. Marketing of cellular service occurs in three basic ways. Each cellular carrier operates its own retail division that provides service and cellular equipment to customers directly. Also, many retail outlets that are unaffiliated with any carrier sell cellular telephones and either send customers to a carrier for service or act as a sales agent for one carrier's service. Finally, Commission rules prohibit restrictions on the resale of cellular service, which makes possible cellular "resellers," another class of competitors at the retail level.[45] Resellers may subscribe to any bulk-rate discounts or wholesale rates offered by the two facilities-based carriers, and provide additional retail competition to the two facilities-based carriers.[46] In practice, resellers have little market share except in markets where they are protected by state regulatory commissions.[47]

28. Cellular is generally a highly profitable business in large cities.[48] Carriers may be less successful in some other markets, however.[49] Stand-alone cellular companies generally do not pay dividends, and some firms carry a burdensome debt.[50] Profitability is discussed in more detail in paragraphs 76-81 below.[51]

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[42] *See* authorities cited *supra* note 20.

[43] SALOMON BROS., *The Wireless Telecommunications Review* ("*Wireless Review*"), Spr. 1994 at 8, Fig. 10.

[44] *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Co., Order*, DA 95-1129 ( May 19, 1995) (WTB), *application for review pending*; *Transfer of U S West, Inc. Cellular Licenses to WMC Partners, L.P.*, Public Notice No. 53875, Report No. LB-95-14, May 12, 1995. The other major change in the corporate structure of the cellular business
that occurred in recent years was Pacific Bell's divestiture of its cellular systems into an unaffiliated company, AirTouch, in 1992.

[45] *Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, Report & Order*, 7 FCC Rcd 4006 (1992).

[46] While cellular resellers do provide competition on price to facilities-based cellular carriers, they may not be able to mitigate whatever market power such carriers have due to the current duopolistic nature of the Commission's frequency allocation.

[47] For example, California mandates specific margins between retail and wholesale prices. As a result, market share of resellers in the largest California markets exceeds 10%. *See California State Petition R&O* ¶¶ 45-51, 62.

[48] *See* Tbl. 9.

[49] *See* Tbls. 9, and 10.

[50] *See, e.g., Craig O. McCaw*, 9 FCC Rcd at 5856 (¶ 30) (references to the financial situation of McCaw Cellular Communications, Inc., the largest stand-alone cellular company, before it was acquired by AT&T).

[51] Mobile telephone services using technologies which pre-dated cellular service are still available, but in an ever-diminishing number of areas. These older services use approximately two MHz (compared to twenty-five MHz for each cellular system). 47 C.F.R. § 22.561.

2. Paging Service

29. In terms of customers, paging or "beeper" service is currently the most popular segment of CMRS. In 1994, there were 27.3 million paging subscribers, a thirty-eight percent increase over the previous year.[52] In its simplest form, a pager is a small portable receiver that vibrates or beeps when its telephone number has been called. The pager, in effect, alerts the subscriber to call a telephone number in order to receive a recorded message that the caller left or to view on the pager the telephone number of the caller. With more sophisticated pagers, a short written or audio message is conveyed via the portable receiver along with the signal.[53]

30. Paging service is provided by several carriers in most areas. In large metropolitan areas, twelve or more providers are typical. Most paging customers take service in a specific local geographic market, but several licensed regional and nationwide carriers exist. The trend in paging is towards regional and national coverage.[54] While there are between 500 and 600 paging carriers in the United States today, fifteen large companies account for approximately sixty percent of the customers.[55] The largest of them are MobilComm and PageNet, which are not affiliated with other telecommunications companies.[56] A period of consolidation of paging companies has begun.[57] Local telephone companies or their corporate affiliates typically provide paging service where the former provide telephone service, but are not dominant providers of the service.

31. Approximately three MHz of spectrum is assigned to paging service; in addition, approximately 1.5 MHz is now used for paging service that was formerly used for the pre-cellular mobile telephone services.[58] Subcarriers on some FM radio stations also may be used for paging service,[59] providing additional capacity for new entry into this business. , In addition, the Commission recently proposed allowing Interactive Video Data Service licensees to use their systems

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[52] Telephony, COMM. DAILY, May 15, 1995 (study by Economic & Management Consultants International, Inc. (EMCI)). At approximately $15 per month (*see infra* para. 32), annual paging service revenues would be approximately $5 billion.

[53] Paging and cellular services are related to each other, as competitors or complements or both. For example, approximately 31 percent of cellular customers also use paging service. *Celltrac: Cellular and PCS User and Potential User Profiles*, EMCI Report, March 1995.

[54] *Third CMRS R&O*, 9 FCC at 8019 (¶ 54).

[55] *Wireless Review*, *supra* note 43, at 21.

[56] *The State of the U.S. Paging Industry: 1994*, EMCI ("*EMCI Paging Report*"), June 1994.

[57] *See, e.g.*, Telephony, COMM. DAILY, June 6, 1995 (A+ Communications and Network USA Paging of Fla. plan $77-million cash-stock merger to create A+ Network Inc.); *Cash Flows and Revenues Up at Arch and USA Mobile, Net Income Down*, COMM. DAILY, May 3, 1995 ("USAM had been target of unsolicited takeover by Metrocall last year, and earlier this year agreed to merge with Arch by 3rd quarter"); Telephony, COMM. DAILY, Apr. 13, 1995 ("Arch Communications bought Professional Paging & Radio in Fla. for $3 million"); Telephony, COMM. DAILY, Jan. 13, 1995 (Paging Network acquires ComTech, plans to buy assets of Southern New England Telephone Paging); *Metrocall Makes $400 Million Bid for USA Mobile and Premiere Page*, COMM. DAILY, Dec. 8, 1994, at 2.

[58] *See generally*, 47 C.F.R. § 22.561.

[59] *Second CMRS R&O*, 9 FCC Rcd at 1507 (¶ 260) (1994). Some such subcarriers are being used for paging service.

for limited mobile use, including paging.[60] Since paging service consists mostly of momentary signals rather than continuous two-way conversations, this relatively small amount of spectrum easily accommodates all 27.3 million subscribers and could accommodate several times that.[61]

32. Charges for local paging service usually consist of a flat monthly fee, averaging between $9 and $17, depending on the number of features and functions the customer desires.[62] Regional and nationwide service is more expensive.[63]

33. Regulation by this Commission is minimal, consisting of allocating frequencies and licensing individual carriers. There is no state regulation of paging services.[64] The Commission has never imposed a numerical limitation on paging systems, unlike the cellular market.

34. Prices for paging receivers range from $60 to $200, depending on the sophistication of the receiver,[65] and receivers are sold and rented through carriers and many retail outlets. While the typical paging receiver can use only one or a few of the frequencies allocated to paging service, the receiver's simplicity (and resultant low cost) makes changing carriers inexpensive.

3. Specialized Mobile Radios ("SMRs")

35. SMRs began in the mid-1970s as a commercial dispatch service providing two-way voice communications between business vehicles (*e.g.*, taxicabs, delivery trucks) and central dispatchers.[66] SMRs were initially created to promote a new, spectrum-efficient technology called trunking, which enables customers to share many channels instead of each customer using a channel on an exclusive basis.[67] SMRs are primarily used for voice communications, but there are SMR systems devoted primarily to data communications, including providing facsimile services.[68] The growth of SMRs has been healthy, with consistent double-digit growth rates. At the end of 1994,

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[60] *Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers*, *Notice of Proposed Rulemaking*, FCC 95-158 (May 5, 1995).

[61] *See* authority cited *supra* note 52.

[62] *See EMCI Paging Report*, *supra* note 56, at 57; Paul Kagan & Associates, *Wireless Market Stats*, Nov. 30, 1994, at 7.

[63] *See, e.g.*, Telephony, COMM. DAILY, Aug. 2, 1995 (daily rate for nationwide paging service is $5); *Windows Paging System for Auto E-Mail Forwarding*, Newsbytes News Network Newsbytes, Aug. 18, 1994 (monthly rate for nationwide paging is $50); *Notable Technologies Shifts Plans from Penpoint to Paging*, Mobile Data Report Capitol Publications, May 23, 1994 (company's lowest monthly rate for regional paging service is $40, and for national paging service is $50); *Bell Atlantic Adding Skytel Mobile Paging*, AUSTIN AMER.-STATESMAN, May 18, 1994, at F-8 (monthly rate for regional paging is $31).

[64] *See* authorities cited *supra* note 31.

[65] *EMCI Paging Report*, *supra* note 56, at 106.

[66] *See Docket No. 18262*, 51 FCC 2d 945 (1975).

[67] *See* Dr. Doron Fertig, *Specialized Mobile Radio*, Private Radio Bureau, Federal Communications Commission, at 4 n.2, and App. (Mar. 1991) ("*Commission SMR Report*"). Although SMRs were created to exploit trunking technology, they may be assigned channels to use conventional single-channel technology.

[68] *See Maxon Selected as U.S. Manufacturer of Low-Cost Mobitex OEM Modem*, PR NEWSWIRE, Apr. 25, 1995. For example, RAM Mobile Data provides the most advanced nationwide wireless data communications service in the United States, reaching 92 percent of the urban business population. *Id.*

approximately 1.8 million vehicles and portable units were served by SMR systems.[69]

36. One of the main differences between cellular and SMR is that not all SMRs are connected to the PSTN. Rather, base stations generally serve as "repeaters," permitting multiple mobile units in a group to talk to each other.[70] Unlike cellular, this Commission has never required a specific technical standard for SMRs. As a result, several different, non-compatible protocols exist. Most SMR telephones can use only one technical protocol for signalling. This, combined with the cost of a new telephone (up to $900), inhibits a customer changing from one SMR system to another. Several SMR providers are in the process of adopting a single digital standard.[71] This could have the effect of largely consolidating technical protocols, at least in the 800 MHz band, and of facilitating customers switching from one SMR to another.

37. Traditionally, SMRs were small, independent companies, unaffiliated with larger communications companies. This is rapidly changing. The Commission recently changed its rules to permit telephone companies and their affiliates (*e.g.*, cellular companies) to own SMRs.[72] The Commission is also replacing its traditional licensing of individual base stations by regulations that allow wide-area licensing similar to that for cellular systems.[73] For example, the Commission recently changed its Rules to allow 900 MHz SMRs to be licensed on a Major Trading Area ("MTA") basis.[74] The Commission is also considering changing the 800 MHz SMR licensing rules to facilitate the consolidation of small SMRs into wide-area SMRs.[75] Thus, while SMRs' service areas generally encompass local markets, they will increasingly be able to expand easily to serve regional and nationwide markets. Moreover, while there are thousands of SMRs in the United States, there is a trend towards consolidation which may

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[69] *The State of SMR and Digital Mobile Radio (1994 and 1995)* at 138, EMCI ("*EMCI SMR Report*"), Jan. 1995.

[70] *Commission SMR Report*, *supra* note 67, at 6.

[71] *See Nextel Communications, Inc.*, *Order*, DA 95-263 (¶ 5) (Feb. 17, 1995) (WTB), *reconsideration denied*, *Order*, DA 95-1677 (July 28, 1995) (WTB); *Celsmer*, *Order*, DA 95-1537 (¶ 2) (released July 10, 1995) (WTB); *Nextel Hopes to Take Lead in Wireless Competition*, SEATTLE TIMES, Nov. 10, 1993, at D-6 ("Nextel and other SMR operators also have learned from cellular's mistakes, Elling said, by adopting a single digital standard").

[72] *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications*, *Report & Order*, GN Docket No. 94-90 (Mar. 7, 1995).

[73] *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, *Notice of Proposed Rule Making*, 8 FCC Rcd 3950, 3952-53 (¶¶ 11-15) (1993).

[74] *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool; Implementation of Section 309(j) of the Communications Act-Competitive Bidding; Implementation of Sections 3(n) and 332 of the Communications Act*, *Second Report & Order and Second Further Notice of Proposed Rule Making*, FCC 95-159 (Apr. 17, 1995).

[75] *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, *Further Notice of Proposed Rule Making*, 59 Fed. Reg. 60,111 (Nov. 22, 1994).

leave one to three large SMRs per market, plus a fringe of smaller SMRs.[76]

38. A total of approximately nineteen MHz of spectrum is available for use by SMRs, fourteen MHz in the 800 MHz band and five MHz in the 900 MHz band.[77] Most of these frequencies were entirely occupied in the larger markets years ago.

39. Although charges are often on a flat monthly fee basis, some SMRs have rate structures similar to those of cellular carriers. Almost all customers buy a telephone or other transceiver from their SMR provider, with typical purchase prices ranging between $600 and $900.[78] Average monthly service fees are approximately $15 for dispatch service, and $50 extra for interconnection to the PSTN.[79]

[76] The largest SMR, Nextel, would like to consolidate SMRs into a nationwide system whose technology will be similar to digital cellular and PCS. *See, e.g., Nextel Communications, Inc., Order*, DA 95-263 (¶ 6) (Feb. 17, 1995) (WTB), *reconsideration denied, Order*, DA-95-1677 (July 28, 1995) (WTB).

[77] Due to technical reasons, 800 MHz and 900 MHz systems tend to be independent of each other. *Commission SMR Report, supra* note 67, at 13-14.

[78] *See EMCI SMR Report, supra* note 69, at 73. In contrast to the general rule in cellular service, rental and financing of telephones by service providers is the exception with SMRs.

[79] *Id.*

4. Air-Ground Service

40. Air-ground service is telephone service on airplanes. It started in the mid-1960s as a service on private airplanes. A more recent and more popular form of the service has been introduced on commercial airplanes, which allows air travellers to place calls by using a credit card, but not to receive calls. This latter service currently is provided by GTE/Airfone, Claircom (affiliated with AT&T/McCaw), and In-Flight (affiliated with MCI).[80]

41. Approximately 4.5 MHz of spectrum is allocated to these two types of air-ground service. Service arrangements on commercial planes are akin to those for pay telephones in stores and restaurants. The premises owner (in this case, the airline) chooses one of the three carriers for some or all of its planes. The individual passenger has no choice of carrier or the associated telephone and pays on a per call basis. A typical charge is $1.50 per minute for this service from an airplane to any point in the United States, regardless of distance.[81] The overwhelming use of air-ground service is for voice communications, but data and facsimile applications are being introduced.[82] Regulation by this Commission consists of frequency allocation and licensing of the carriers; there is no state regulation. Of six available licenses, only three are in use, so there is room for entry by three new carriers.

[80] For technical and safety reasons, regulations of the Commission and the Federal Aviation Administration forbid the operation of cellular telephones on airplanes that are airborne. 47 C.F.R. § 22.925(a)(1).

[81] This charge is for both the "radio link" and for completing the call over the "landline" network.

[82] Robert E. Calem, *A New Digital Air-to-Ground Link Gets an In-Flight Test*, N.Y. TIMES, Jan. 15, 1994, at Sec. 3, p.7.

5. Satellite Systems for Mobile Communications

42. Mobile telecommunications service is provided by several satellite-based systems throughout the United States. The existing systems are mostly oriented towards unpopulated or lightly populated areas, where cellular service is often unavailable. The primary use of these systems is for voice communications, although data and facsimile communications are possible. Customers subscribe to a particular service, which is provided on a specific satellite. Subscribers to these satellite-based services are few at present. Charges are relatively high, which is one reason why the present satellite-based mobile telephone service is attractive only in rural areas.[83] Most telephones for satellite-based systems can use only the frequencies assigned to one satellite; this, combined with the cost of a new telephone, inhibits a customer changing from one service to another.

43. The Commission has recently licensed several systems of "Low Earth Orbit" satellites ("Little LEOs" and "Big LEOs"), which the licensees have asserted will provide a variety of mobile voice and data services.[84] Little LEOs have been allocated approximately three and one-half MHz of primary spectrum. They are expected to be more oriented towards non-voice communications for businesses and government entities.[85] Big LEOs are expected to be competitive for voice and other services in all geographic markets (rural and urban), and have been allocated thirty-three MHz of spectrum. Both kinds of LEO systems are not expected to provide service until the late 1990s, which makes their impact on the present marketplace minimal.

6. Maritime Services

44. Communications services to ships and fixed offshore installations such as oil rigs are provided by stations on land ("public coast stations") and by satellites other than those mentioned in the preceding section. Public coast stations use approximately fifteen MHz of spectrum and satellites use nineteen MHz of spectrum, for a total of almost thirty-four MHz. Both provide the full range of voice, data, and other capabilities featured in services for land-based units. While these services are necessary for the protection of life and property on the water, much of their actual use is for business and personal communications.[86] Federal regulation consists of frequency allocation, licensing, and various rules to promote safety.

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[83] As the Commission stated in the *Third CMRS R&O*, 9 FCC Rcd at 8112 (¶ 269), "[c]urrently, providers of MSS (mobile satellite systems) expect to serve as a complement to terrestrial services for the most part since their service will be relatively expensive and therefore generally will not be a constraining factor on the price of terrestrial services."

[84] The Commission recently licensed Orbital Communications Corp. to operate a Little LEO system. In addition, the Commission recently issued Big LEO licenses to Motorola ("Iridium"), TRW ("Odyssey"), and Loral/Qualcomm ("Globalstar"). *See, e.g., Application of Orbital Communications Corp. for Authority to Construct, Launch and Operate a Non-Voice, Non-Geostationary Mobile Satellite System, Order & Authorization*, 9 FCC Rcd 6476 (1994) ("*ORBCOMM*"); *Amendment of the Commission's* (continued...)

[84](...continued)
*Rules to Establish Rules & Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, Report & Order*, 9 FCC Rcd 5936 (1994).

[85] *See, e.g., ORBCOMM*, 9 FCC Rcd at 6476-77 (¶ 4).

[86] *See generally, Amendment of the Commission's Rules Concerning Maritime Communications, Notice of Proposed Rule Making & Notice of Inquiry*, 7 FCC Rcd 7863 (1992).

7. Personal Communications Services ("PCS")

45. The Commission has allocated 153 MHz of spectrum for PCS, which is divided into three broad categories, broadband, narrowband, and unlicensed. The general philosophy of this major allocation is to allow the market, rather than the Commission, to determine the best use of this spectrum. The Commission defined PCS as a "wide array of mobile, portable and ancillary communications services to individuals and businesses."[87] It is expected however, that broadband PCS providers will initially offer primarily mobile telephone service, starting later this year in a few places;[88] that narrowband PCS providers will offer advanced paging-like and messaging services; and that unlicensed PCS will accommodate a wide variety of services within small areas, such as data networking within office buildings. The Commission also expects that PCS generally will inject major new competition into the mobile telecommunications services market by creating at least three new major competitors to cellular and other current CMRS providers in each area.

46. The Commission has allocated 120 MHz to broadband PCS, which has been licensed in six bands; three bands each containing thirty MHz (Blocks A, B and C), and three bands each containing ten MHz (Blocks D, E and F).[89] The Commission recently licensed Blocks A and B for forty-seven large territories (MTAs),[90] and the other four blocks each will be licensed for 493 territories called Basic Trading Areas or "BTAs".[91] Table 2 lists the licensees in Blocks A and B and other pertinent data. Most of these licensees are companies, or joint ventures of companies, that are already established in the cellular business. In the auctions for Blocks C and F, the Commission has limited bidder eligibility to "entrepreneurs" with less than $125 million in gross revenues and $500 million in total assets. Winning bidders for these entrepreneurs' blocks may pay for their licenses in installments and small businesses (under $40 million in gross revenues), including small businesses owned by minorities and women and small rural telephone companies, are eligible for bidding credits and enhanced installment payments.[92] Rural telephone companies are eligible

[87] *See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Notice of Proposed Rule Making*, 8 FCC Rcd 7635, 7654 (¶ 116) (1993).

[88] *Spectrum-Sharing Unit Wins Patent; PCS Operator to Start Service This Year*, COMM. DAILY, May 11, 1995.

[89] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion & Order*, 9 FCC Rcd 4957, 4963, 4970-71 (¶¶ 17, 26-27) (1994) ("*PCS MO&O*").

[90] *Id.*, 9 FCC Rcd at 4969-70, 4988 (¶¶ 24 n.23, 26, 78); Commission News Release 54546, FCC Grants 99 Licenses for Broadband Personal Communications Services in Major Trading Areas (June 23, 1995).

[91] *PCS MO&O*, 9 FCC Rcd at 4969 (¶ 24 n.23).

[92] Pursuant to Section 309(j)(4)(D) of the Communications Act, 47 U.S.C. § 309(j)(4)(D), the Commission also established higher bidding credits, enhanced installment payments, and other auction measures specifically to assist entrepreneurial businesses owned by members of minority groups and women. *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order in PP Docket No. 93-253*, 9 FCC Rcd 5532 (1994), *on reconsideration, Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994). For the upcoming C Block auction, the Commission has proposed to eliminate the race- and gender-based measures to avoid further delay and legal uncertainties raised by the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña*. 63 U.S.L.W. 4523 (U.S. June 12, 1995). This proposal was based on the unique circumstances of the C Block auction, which was scheduled to commence in August

(continued...)

to obtain smaller, geographically partitioned broadband PCS licenses in order to provide service in their rural, wireline service areas.

47. The spectrum allocation for broadband (and unlicensed) PCS was a reallocation of fixed point-to-point microwave service frequencies (used to provide services to railroads, utilities, and the police).[93] This spectrum is currently encumbered and must be cleared before it can be used effectively. The introduction of PCS in most of the country is not expected until 1996.[94] Therefore, market structure, geographic scope, popularity, economics, rate structure and level and terminal equipment are not yet determined.[95] Generally, the system design will be similar to cellular, except that these systems will operate in a digital format upon their inception (in contrast to the relatively inefficient analog systems still prevalent in the cellular business). Also, because of the propagation characteristics of the broadband PCS frequencies, many more cells and base stations will be required than for cellular. This may increase the cost of infrastructure for broadband PCS compared to that for cellular unless there are significant economies of scale in the production of base stations for broadband PCS. On the other hand, the hope is that broadband PCS will have hand-held telephones that will be relatively light and inexpensive.

48. Several of the Commission's rules for broadband PCS are designed to promote competition. For example, broadband PCS licenses will be useable for any mobile service, in contrast to the Commission's earlier allocations, which tended to be specifically for telephone, dispatch, paging, *etc.* This flexibility will allow carriers to respond to market demand without needing to surmount regulatory hurdles. Also, the Commission has imposed "spectrum caps" which limit the amount of spectrum that any one entity may control in the same area. There is a 10 MHz limit on broadband PCS spectrum for cellular carriers in their cellular service areas,[96] a 40 MHz limit on all entities for broadband PCS,[97] and a 45 MHz limit on all entities for broadband PCS, cellular and SMR spectrum.[98]

49. Narrowband PCS received an allocation of three MHz from the Commission, all of which is expected to be used for advanced messaging. Auctions have been held and licensing has begun. Ultimately the Commission will issue ten national licenses, thirty regional licenses, and more than 3,500 licenses for smaller areas.[99] Most

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[92](...continued)
1995 when the Court's decision in *Adarand* was announced. The Commission emphasized that the limited proposal should not be read to indicate that it has concluded that race- or gender-based measures are inappropriate for future spectrum auctions. *See Further Notice of Proposed Rule Making* in PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252, FCC 95-263 (released June 23, 1995).

[93] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report & Order*, 8 FCC Rcd 7700, 7725 n.52, 7738 (¶¶ 56 n.52, 88) (1993) ("*Second PCS R&O*").

[94] One licensee expects to begin service by the end of 1995. See authority cited *supra* note 88.

[95] PCS systems are operational in several countries in Europe.

[96] *PCS MO&O*, 9 FCC Rcd at 4983-84 (¶ 67). Also, pursuant to the Commission's rules, cellular carriers may acquire an additional 5 MHz after Jan. 1, 2000. *Id.*

[97] *Second PCS R&O*, 8 FCC Rcd at 7728 (¶ 61); *PCS MO&O*, 9 FCC Rcd at 4983-86 (¶¶ 66-71).

[98] *Third CMRS R&O*, 9 FCC Rcd at 8109-10 (¶ 263). *See also PCS MO&O*, 9 FCC Rcd at 4983-85 (¶¶ 66-68).

[99] Auctions for nationwide narrowband licenses began in July 1994 and began for regional licenses in (continued...)

of these licensees are already providing paging or other mobile telecommunications services. Like broadband PCS, the service is embryonic and the market structure, popularity, economics, rate structure and levels and terminal equipment are currently unknown. There is a spectrum cap limiting each carrier to hold no more than three narrowband PCS licenses in a market.[100]

50. Unlicensed PCS received an allocation of thirty MHz from the Commission.[101] Unlicensed PCS will consist of terminal devices, such as telephones, without centralized base stations. The devices will likely consist of new cordless telephones, local area networks in offices, and other kinds of short-range communications. Unlicensed PCS operations are restricted to very low power, which limits their range but enables spectrum to be reused quite efficiently. The Commission has adopted a spectrum etiquette intended to avoid interference problems between users sharing the frequencies.[102] The spectrum etiquette requires actions such as limiting the duration of transmissions, and listening to make sure no one else is operating before transmitting. The Commission also established procedures for broadband and unlicensed PCS operators to pay for microwave system relocation to avoid interference and other problems on the spectrum.[103]

### B. Private Mobile Radio Services ("PMRS")

51. Cellular carriers and other CMRS providers face some competitive pressures from services that are not themselves included in the CMRS category. Specifically, the Commission has made frequency allocations for an array of "private" mobile radio communications systems, collectively called the private mobile radio services ("PMRS"). Typically, these systems serve the internal needs of a specific business or state or local government entity.[104] Alternatively, a private system can provide service to others on a for-profit basis and still be classified as PMRS as long as it is not connected to the PSTN. Most PMRS are used for voice dispatch communications, but data, facsimile,

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[99](...continued)
October 1994. Of the 29 bidders that began the nationwide auctions, 6 have won licenses, with the bids totaling $617 million. Twenty-eight (28) bidders began the regional auctions. As of May 30, 1995, the Wireless Telecommunications Bureau has granted 25 of the 30 licenses; the winners' bids totaled $489 million (which certain credits reduced to $393 million). The next narrowband auctions will be for 561 licenses for MTAs and 2,958 licenses for BTAs.

[100] The Commission believed this would allow narrowband PCS providers the flexibility to combine channels to accommodate specific service needs and would ensure that it is offered on a competitive basis. *Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, Memorandum Opinion & Order*, 9 FCC Rcd 1309, 1312-13 (¶¶ 20, 24, 25) (1994).

[101] *PCS MO&O*, 9 FCC Rcd at 4990 (¶ 84). *See also Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, First Report & Order and Second Notice of Proposed Rule Making* ("*Government Re-Allocation*") (¶¶ 1, 6, 16-19) FCC No. 95-47 (Feb. 17, 1995).

[102] *Second PCS R&O*, 8 FCC Rcd at 7776-78 (¶¶ 181-86); *PCS MO&O*, 9 FCC Rcd at 5042-49 (¶¶ 224-44).

[103] *Second PCS R&O*, 8 FCC Rcd at 7736-38 (¶¶ 83-88). The Commission is also considering a proposal by Pacific Bell Mobile Services, which would require future PCS licensees who benefit from the relocation of a microwave system to bear a share of the costs of relocating that system. *See* Petition for Rulemaking of Pacific Bell Mobile Services Regarding a Plan for Sharing the Costs of Microwave Relocation, RM-8643, (filed May 5, 1995).

[104] Examples include communications within a large factory or building complex or on a construction site, along a railroad track or pipeline, or between the headquarters and mobile units of a police force.

remote control and other communications make up a substantial minority of total usage.[105] Allocations for such systems total approximately seventy MHz. Some of these allocations are for specific types of licensees (such as public utilities, transportation companies, and public safety entities); other allocations are for general business use.[106]

52. Private mobile radio systems were in existence before the first "public" systems, and today approximately fifteen million transmitters are in use.[107] Estimates of the value of equipment used in private systems range up to $30 billion.[108] The coverage provided by these systems is a mixture of local, regional and national. By definition, "rates" are not charged by private systems. Federal regulation consists of frequency allocation, individual licensing, and overseeing usage to ensure, for example, that police allocations are being used only for police business. There is no state regulation of private systems.

53. Competition may exist between commercial and private systems at the procurement stage, when a business may have a mobile communications need that could be met either by subscribing to a commercial system (*e.g.*, cellular, SMRs) or by investing in a private system of its own. For example, in 1993, United Parcel Service committed to a large purchase of cellular service and data terminals to serve its fleet of vehicles and delivery persons nationwide. The company had considered building its own private network, as well as SMR offerings.[109]

54. There may also be later competition. A private licensee that needs to use an additional mobile unit might, if a significant amount of the new mobile's usage will be for voice communication with the general public, choose to subscribe to cellular service instead of adding another unit onto its private system. Many businesses use a mixture of their own private systems and common carrier services (usually cellular and paging) to meet their total need for mobile telecommunications. Telephones and other terminal equipment for private systems are usually sold as part of a total system "package," so there is no market for terminals independent of the systems. The spectrum for private systems is being used in all urban areas.[110]

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[105] For a description of the communications uses of PMRS by public safety agencies, see *Report and Plan for Meeting State and Local Government Public Safety Agency Spectrum Needs Through the Year 2010, Report & Plan*, 1995 WL 259663 (Feb. 9, 1995).

[106] Private systems are generally regulated by Part 90 of the Commission's Rules and are described in the *Second CMRS R&O*, 9 FCC Rcd at 1442-54 (¶¶ 71-99). The largest among them are the Industrial Radio Services (which includes the Business Radio Service), the Land Transportation Radio Services, the Public Safety Radio Services, and the Special Emergency Radio Service.

[107] *Spectrum Efficiency in the Private Land Mobile Radio Bands in Use Prior to 1968, Notice of Inquiry*, 6 FCC Rcd 4126-28 (¶¶ 8, 17) (1991); *Commission Final Land Mobile Radio Service Summary.*

[108] *See* letter from User Associations to William F. Caton, Commission Acting Secretary, dated Jan. 13, 1995, at 5 ($25 billion value for PMRS systems not including ones using 800 MHz and 900 MHz bands).

[109] *UPS Tells Why It Chose Cellular for New National Data Network*, Advanced Wireless Comm. Telecom Pub., Feb. 17, 1993.

[110] *See Spectrum Efficiency in the Private Land Mobile Radio Bands in Use Prior to 1968, Notice of Inquiry*, PR Docket No. 91-170, 1991 WL 641004; *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, Notice of Proposed Rule Making*, 7 FCC Rcd 8105 (1992), *Report and Order and Further Notice of Proposed Rule Making*, FCC

(continued...)

55. PMRS frequencies are also used by commercial systems that are not connected to the PSTN.[111] These systems are primarily used for voice communications of a dispatch nature ("simple dispatch"), although data communications are increasing rapidly. Coverage is generally local. There is no numerical rule about how many systems for such service there may be, but in most areas, several small companies operate such systems. These companies are generally not affiliated with other telecommunications service providers. Almost all customers buy a receiver from their service provider. Monthly service charges are mostly flat-rate and typically range between $10 and $20. Changing suppliers generally involves modifying or changing the radio equipment. The simple dispatch business is widely believed to be stable, with companies surviving as "niche" or "low end" competitors.[112]

## III. FINDINGS

56. This Section reviews previous findings about CMRS markets and competition and discusses the Commission's current views. These views are evolving based both on dynamic industry changes and the additional data that the Commission receives during regulatory proceedings. Because the cellular business is currently by far the largest element of CMRS in dollar volume, this Section focuses primarily on it. The Commission is also very interested, however, in the degree of competition between cellular and the other elements of CMRS. Following standard competitive analysis, this Section begins by discussing what the "relevant market(s)" might be,[113] followed by a discussion of such data concerning competition as the Commission has available.

### A. Relevant Market Definition

57. The facts and previous findings by the Commission and others can support differing views about which mobile radio services compete with each other (and with "wireline" service) and thereby have a constraining effect on pricing and other conduct. These assertions are often stated in terms of defining "product" or "geographic" markets -- which are, generally, the services that are competitive with each other and the areas in which they are available. Markets have been alleged that contain some or all services within the CMRS category, and some services outside it.

58. The Department of Justice ("the DOJ") has posited a relevant market consisting of only cellular service[114] and another consisting only of "trunked SMR service in the 800 MHz, 900 MHz and 220 MHz bands."[115]

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[110](...continued)
95-235, 1995 WL 373694 (released June 23, 1995). In those proceedings, the Commission is relieving spectrum congestion and expanding the availability of channels on existing private land mobile radio allocations.

[111] *Second CMRS R&O*, 9 FCC Rcd at 1446 (¶ 77).

[112] For a general description of PMRS, *see generally* authorities cited *supra* in notes 105-07, 109-10.

[113] *United States v. Continental Can Co.*, 378 U.S. 441, 447 (1964); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957); *Standard Oil Co. v. United States*, 337 U.S. 293, 299-300 n.5 (1949).

[114] *See, e.g., United States v. AT&T Corp.*, Competitive Impact Statement at 6, No. 94-01555 (D.D.C. filed Aug. 5, 1994).

[115] *United States v. Motorola, Inc.*, Competitive Impact Statement at 6, No. 1:94CV02331 (D.D.C. filed Oct. 27, 1994).

59. Another view would conclude that the product market is broader. The Commission's *Third CMRS Report and Order* contained an analysis of trends in CMRS and found that the direction is away from a "balkanized view" that sees cellular, SMRs, paging, *etc.*, competing in separate markets:[116]

> growth in the wireless marketplace is bringing with it an increasing degree of service convergence. Technology and consumer demand, facilitated by our general policy not to restrict the services that can be provided over any particular band, are prompting commercial service providers to follow marketing strategies that blur the differences between the various services comprising the wireless marketplace.[117]

The Commission found evidence suggesting growing substitution (a) between cellular service and wide-area SMRs,[118] (b) between cellular and paging services,[119] (c) between SMRs, paging, and Business Radio Service,[120] and (d) between nominally private mobile radio systems on the one hand and common carrier systems such as cellular, paging, and SMRs on the other.[121] The Commission also found that traditional distinctions, such as between voice and data services and between one-way and two-way services (and terminal equipment), are collapsing.[122]

60. The principal force driving this convergence, the Commission noted, was the desire of carriers to meet the demand of their customers for "one-stop shopping," the ability to buy at one place a mixture of different mobile services.[123] For its part, the Commission emphasized that its policy is to allow such convergence. "[A]ll CMRS providers should have the potential to utilize any CMRS spectrum in a manner that can adapt the nature of the service they provide to meet specific customer needs. . . . [E]ven if CMRS providers offer differing services today, if consumers desire particular services or combinations of services in the future, a variety of CMRS providers should have the opportunity to use different technological configurations to meet this customer demand in competition with other CMRS carriers."[124]

61. The convergence noted by the Commission would support broader product markets than those found by the DOJ. One such broader view, emphasizing functionality, would divide CMRS and related services into three categories: telephone service, dispatch, and paging. Another broad view, emphasizing market power, would see mobile two-way voice service, which now

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116 *Third CMRS R&O*, 9 FCC Rcd at 8020-21 (¶ 57).

117 *Id.*, 9 FCC Rcd at 8020 (¶ 56) (footnotes omitted). *See also id.*, 9 FCC Rcd at 8020-26 (¶¶ 57-68). In addition to technical developments that blur the distinction between services, companies providing different services are affiliating so that they may offer, in one package, services that were traditionally distinct. *See, e.g.*, Mike Mills, *MCI Deals Itself a Niche in Growing Paging Market*, WASH. POST, Jan. 7, 1995, at D-2.

118 *Third CMRS R&O*, 9 FCC Rcd at 8026, 8028-29, 8109 (¶¶ 67, 72, 261-62).

119 *Id.*, 9 FCC Rcd at 8023-24 (¶ 62).

120 *Id.*, 9 FCC Rcd at 8021 (¶ 58).

121 *Id.*, 9 FCC Rcd at 7996 (¶ 12).

122 *Id.*, 9 FCC Rcd at 8030-34 (¶¶ 74-75).

123 *Id.*, 9 FCC Rcd at 8022-23 (¶ 61).

124 *Id.*, 9 FCC Rcd at 8026-27 (¶ 69).

includes cellular service and interconnected SMRs (both wide-area and local), as the center of power in mobile telecommunications. These services form a core, around which there is a ring of other services that may exert varying degrees of constraint on the core services (and which may be constrained by the core services to some extent). The ring consists of non-interconnected SMRs, paging service,[125] some private systems, and air-ground, satellite-based and maritime services. Government systems,[126] other private systems, and perhaps even "low end" services such as Citizens Band and walkie-talkies[127] might also be included. Finally, market definition must include consideration of PCS, which is virtually certain, eventually and significantly, to blur pre-existing market boundaries and to intensify competition at all levels.[128] Already, there is evidence of declining cellular prices and increasing features, which has been attributed to PCS's approach.[129] Also adding to the blurring and intensity would be any Commission action that facilitates the consolidation of small SMRs into wide-area systems providing mobile telephone service.[130]

62. Eventually, these services could converge to the extent that there could be a single product market of communications services for all "people on the move."[131] This would include the services mentioned in the two preceding paragraphs as full participants and also a certain amount of pay telephone and other wireline usage.[132]

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[125] This view would hold that paging service, although highly popular, does not constrain cellular service to a significant extent.

[126] The federal government uses a large amount of spectrum for its mobile communications needs, independent of the Commission's regulatory authority. Some of the communications provided on these frequencies are similar to mobile telephone service, the services provided by SMRs, and the capabilities afforded by private systems. There is evidence of some substitution occurring between government and these latter systems. Concerning competition between government and commercial systems, *see, e.g.*, COMM. DAILY, Sept. 22, 1994, at 9 (U.S. Army is examining use of cellular radio and Direct Broadcast Service to supplement its private radio systems) and National Telecommunications and Information Administration, *Spectrum Efficiency*, NTIA Report No. 93-300, at 32 (Oct. 1993).

[127] Citizens Band ("CB") radio service is a short-distance voice communications service. Generally, CB and walkie-talkies have the advantages of convenience and low cost and the disadvantages of lacking privacy and interconnection. *See generally*, 47 C.F.R. § 95.401.

[128] The Commission stated in the PCS Allocation Order that it was creating PCS to be "competitive with existing services such as cellular, SMRs and others." *Second PCS R&O*, 8 FCC Rcd at 7715 (¶ 31).

[129] *See* authorities cited *supra* note 33.

[130] *See supra* notes 74-75 and accompanying text.

[131] *See also Third CMRS R&O*, 9 FCC Rcd at 8021 (¶ 58) ("[t]he common characteristic of mobile services customers is their need to communicate electronically on a real-time basis (or virtually real-time basis) while they are 'on the move'").

[132] Coin or "pay" telephones use the "wireline" public switched telecommunications network and are particularly accessible to persons who are away from their normal locations. The Commission's Memorandum Opinion and Order concerning the acquisition of a large cellular carrier, McCaw Cellular Communications, Inc., by AT&T, noted "anecdotal evidence that there appears to be some substitution occurring between interexchange calls from cellular units and some kinds of interexchange calls from "wireline" telephones (operated-assisted and credit card calls)." *Craig O. McCaw*, 9 FCC Rcd at 5847 n.36 (¶ 14 n.36 ).

63. The geographic scope of CMRS competition is less open to disagreement. Satellite-based, air-ground, and some paging services are clearly provided on a nationwide basis. The providers of the other mobile radio services mentioned above, however, offer service primarily on local or metropolitan bases, not on regional or national ones.[133]

64. Broader geographic markets have been asserted on several grounds. First, some carriers are offering "regional" service options, which give customers flat-rate calling areas as large as a whole state. At the present time, however, such plans (and customers using them) are the exception, not the rule.[134] Second, most mobile radio services are provided by large regional or national corporations, and there is case law holding that the relevant geographic market is nationwide when a service, even a local one, is provided uniformly across the nation by centrally managed companies.[135] Third, the industry and some analysts speak increasingly of customers demanding "seamless service."[136] However, this may show simply that some customers want a recognized national brand name on a product that remains essentially local. In sum, while there is evidence that regional and national markets may be emerging, it appears that the vast majority of mobile radio services are provided in local and metropolitan geographic markets under current conditions.[137]

### B. Evidence of Competition

#### 1. General Discussion

65. Although the cellular business, with two facilities-based carriers starting at approximately the same time and no known case of a cellular system ceasing operation, is more competitive than many telecommunications markets have traditionally been, it is not the model of perfect competition. The DOJ has found little competition within its "cellular only" product market.

> The Department's extensive investigations into the cellular industry . . . indicate that cellular duopolists have substantial market power . . . . The basic structural problem with cellular markets is well known -- the fact that they are and have been duopolies with (at least until very recently) absolute

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[133] Each provider's local area is not the same as the others', however. In one area, a cellular carrier and an SMR, or two paging carriers, may have service areas that overlap only partially.

[134] For example, McCaw once offered toll-free calling virtually throughout Florida as one service option for its customers there; GTE Mobilnet in California offers a similar option that covers nine MSAs. *See* authority cited *supra* note 26. *See also* R. Harris & D. Rubinfeld, *An Economic Analysis of Tomcom-Primeco: The AirTouch-US West/Bell Atlantic-NYNEX Joint Venture in Wireless Communications* at 4 n.1, Univ. of Calif., Berkeley, and the Law & Econ. Consltg. Grp. Inc. (1994) ("*Harris & Rubinfeld*").

[135] *United States v. Grinnell Corp.*, 384 U.S. 563, 575-76 (1966).

[136] *See, e.g., Craig O. McCaw*, 9 FCC Rcd at 5859-60 (¶ 33); *Harris & Rubinfeld, supra* note 134, at 17 & n.12.

[137] The foregoing discussion in the text is focused on nationwide trends over time. An individual proceeding in which the Commission finds product and geographic markets, such as a certain proposed merger, may present facts pointing clearly to one or another of the alternatives discussed above as the appropriate market(s) within which to analyze the competitive effects of the merger.

> barriers to entry. While the FCC's decision to issue two cellular licenses -- rather than only one -- was motivated by a desire to stimulate competition, . . . two firm markets are not particularly competitive. The noncompetitiveness of two-firm markets is exacerbated here by the overlapping alliances of the cellular carriers, so that firms that "compete" with each other in one market are partners in another.[138]

The DOJ buttressed its conclusion with extensive quotations from documents in the Bell companies' files that showed consciousness of their own power in the marketplace.[139]

66. The DOJ's view is consistent with the 1992 finding of the United States Government Accounting Office ("GAO"). GAO stated that "the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[140] Nor has the Commission's view of cellular competition been to the contrary. In the *Second CMRS Report and Order*, the Commission found that "while competition in the provision of cellular services exists, the record does not support a conclusion that cellular services are fully competitive."[141] It is widely expected that broadband PCS will be major new competition for cellular systems. Indeed, a major reason that the Commission created all forms of PCS was to add more competition to CMRS in general.

67. With respect to other elements of CMRS, the Commission has found that all of these lack market power[142] and are competitive.[143] In particular, the Commission found that:

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[138] *Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers* at 14-15, *United States v. Western Electric Co.*, Civ. Action No. 82-0192 (HHG), D.D.C., filed July 25, 1994 (quotation marks, citations, and punctuation omitted).

[139] *Id.* at 15-18. The Bell companies have disputed the DOJ's conclusions, claiming that "[t]here is no 'bottleneck' in wireless services" and that "[t]he cellular services market shows no signs of domination by a small group of suppliers." *Memorandum of the Bell Companies in Support of their Motion for a Modification of Section II of the Decree to Permit Them to Provide Cellular and Other Wireless Services Across LATA Boundaries*, at 6, in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C. filed June 20, 1994); *Memorandum of Bell Atlantic Corp., BellSouth Corp., Nynex Corp., and Southwestern Bell Corp. in Support of their Motion to Vacate the Decree*, at 45, *United States v. Western Electric Co.*, ("*BBNS Memorandum*") No. 82-0192 (D.D.C. filed July 6, 1994). The Bell companies' principal evidence is the success in each market of the cellular company that is not affiliated with the local telephone company. The remainder of the Bell companies' evidence is the future (continued...)

[139](...continued)
competition that Nextel and PCS are expected to offer. In 1994, PCS was described as "imminent." *BBNS Memorandum* at 45, 60-61.

[140] July 1992 Gen. Acct'g Off. Rep., Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry, GAO/RCED-92-220 at 2 ("*GAO Report*"). GAO's analysis of limited data on prices in the cellular telephone industry showed similar pricing by the carriers in most of the major markets; but it did not yield much information about the competitiveness of the industry. GAO noted that such an analysis "would require considerable information, including revenue and cost data, for carriers' operations in each market. The FCC has not obtained these data, . . ." *Id.* at 2-3.

[141] *Second CMRS R&O*, 9 FCC Rcd at 1467 (¶ 138).

[142] *Id.*, 9 FCC Rcd at 1467 (¶ 137).

[143] *Id.*, 9 FCC Rcd at 1468 (¶ 139).

a) "the paging industry is highly competitive",[144]

b) the interconnected SMRs that provide mobile telephone service, and which may therefore be considered in competition with cellular carriers, have a small share of the mobile telephone business and do not exercise market power;[145] and

c) no air-ground service provider is dominant.[146]

68. With respect to CMRS (and cellular service in particular) in seven states that wished to continue regulating rates, the Commission found that the states had not shown that doing so was necessary to protect consumers from unreasonable or unreasonably discriminatory rates.[147]

69. The Commission's goal is for next year's *Report* to build on this one by providing a base-line with which to begin the evaluation of competition in the markets in which CMRS providers compete and to define those markets more specifically than the current data allow. *Reports* in future years may be able to reach more definitive conclusions about markets and degrees of competition, both within CMRS and between CMRS and other services. This *Report* will analyze data that is now available, which comes from two sources, financial analysts' reports and data submitted in various recent Commission proceedings. This data allows this *Report* to draw certain conclusions about prices, profitability and entry, three subjects that are frequently analyzed in standard competitive analyses.[148]

2. Prices of Offerings

70. The goal of promoting competition is largely an attempt to promote good value for consumers, *i.e.*, a reasonable price for the level of quality. Thus, price is an essential indicator of competitive performance. For mobile radio services, price is a complicated factor. As discussed in paragraph 22 above, cellular prices have at least three main elements. These are monthly access, per minute peak-use period, and per minute off-peak-use period charges. In addition, there may be fees for activation, termination, and roaming. In some bundled offerings, monthly access charges are combined with a certain number of "free" minutes of usage. Further, contract length may be a factor. It is also useful to know definitions such as what is the peak period and what are billing increments. Further complicating the analysis, cellular contracts often include bundled terminal equipment. In the future, cellular services may add pricing factors, such as message units aimed at data rather than at voice services. Finally, cellular service providers typically offer several pricing options, each aimed at a different type of customer.

71. Given this level of complexity, prices for mobile services can be summarized in the

144 *Id.*, 9 FCC Rcd at 1468 (¶ 140).

145 *Id.*, 9 FCC Rcd at 1468-69 (¶¶ 141-43).

146 *Id.*, 9 FCC Rcd at 1469-70 (¶ 144).

147 *See, e.g., California State Petition R&O* ¶ 141 (the "evidence does not . . . unambiguously demonstrate that market conditions fail to protect consumers adequately from unjust and unreasonable rates, or from unjustly and unreasonably discriminatory rates"), *applying* 47 U.S.C. § 332(c)(3)(A)(i).

148 *See, e.g., Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report*, 9 FCC Rcd 7442 (¶¶ 201-46) (1994).

form of price indices. This is a common practice.[149] For example, a price index might consist of the best (lowest) available monthly price for 160 peak period and 40 off-peak period minutes. This number would be calculated using the monthly charge, number of free minutes and per minute charges for each price offering. The index would be the lowest such cost. Several indices can be developed for different numbers of minutes.

72. The Commission does have some price data from PR Docket No. 94-105, which concerns the rate regulation of certain CMRS services in the State of California. In that proceeding, the California Public Utilities Commission ("CPUC") submitted price and cost data that it had gathered from eleven carriers over a five year period (1989-1993) and from three more carriers over the last four of those years.[150] Using this data, the Commission developed weighted best price indices for 60, 120 and 480 minutes per month. Similarly, a weighted cost index was developed, using confidential data on the actual number of subscribers in 1991 as weights. Thus, two sets of aggregations were created, a four-year fourteen-carrier version and a five-year eleven-carrier version. These aggregations are displayed in Tables 3 through 6 hereto.[151]

73. In addition to the data provided by the CPUC, several commenters in PR Docket No. 94-105 submitted their own price data. Table 7 contains data submitted by AirTouch Communications to show how prices vary from market to market.[152] Table 8 contains data submitted by AirTouch and BellSouth on cellular prices in Los Angeles.

74. The two main findings to be derived from these data are that prices vary significantly across markets and that they are falling. The aggregations indicate that, at least in California, depending on the number of minutes used, cellular prices fell approximately ten to fifteen percent between December 1989 and December 1993. This shows lower costs being passed on to consumers. Some consultants and observers in the news media assert that more recent price decreases can be attributed to the impact of impending competition from PCS.[153]

75. The Commission is also interested in comparing wireless telephone service prices to wireline prices. There is some conjecture that wireless services can eventually compete with wireline telephone service, and any such competition would be a major pro-competitive development in the telecommunications business.[154] The numbers in Tables 3-8 indicate a significant premium for mobile service today as compared to wireline service. It therefore appears that wireless telephone service prices will have to fall well over fifty percent (or that wireline prices will have to rise to meet them) for wireless service to be fully price-

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[149] *See, e.g.*, William B. Shew, *Regulation, Competition, and Prices in Cellular Telephony*, Am. Entrpr. Inst. for Pub. Pol'y Res. Working Paper, at 49-50 (1994).

[150] *See Petition of the People of the State of California and the California Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, PR Docket No. 94-105, at Apps. H and J, filed Aug. 8, 1994.

[151] Individual companies' confidential data are aggregated in the Tables and, therefore, are not revealed.

[152] This data was associated with an affidavit by Prof. Jerry A. Hausman.

[153] *See* authorities cited *supra* in note 33.

[154] *Accord, Harris & Rubinfeld, supra* note 134 at 13-14.

competitive with traditional wireline telephone service.[155]

3. Profitability

76. The operating profits of a firm are an important indicator of competition for two reasons. First, high profits are generally a sign of high prices (relative to cost). Second, economic theory predicts that high rates of return will induce additional investment, including additional entry, in the absence of barriers to entry.

77. There are two complementary indicators used to determine whether profits in excess of economic costs ("economic rents") exist, economic rates of return and accounting rates of return. Economic rate of return measures the return to an investment, in a particular asset or for a company, over its full life. Accounting rate of return is generally at the company level and measures the return in a specific year.[156] Economic rates of return are preferable; accounting rates of return, however, are often easier to obtain, and are generally correlated with economic rates of return.[157]

78. In analyzing profits in parts of the CMRS industry such as cellular, paging and SMRs, the appropriate standard is for a growth industry, rather than for a mature industry. There are at least three important differences between growth and mature industries. First, growth industries tend to have higher profits.[158] Second, growth industries need cash from high profits to fund investment in additional plant and equipment.[159] Third, the profits of growth industries typically follow a pattern in which firms incur start-up losses, followed by rising profitability, which is followed by declining profitability as entry by newcomers becomes relatively imminent, and a further decline when such entry finally occurs.[160] Viewed through this paradigm, at this stage in its development, higher than average operating profits may reflect where

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155 Even if the prices were comparable, the limited capacity of wireless networks might constrain the competitive threat they could pose to wireline service. It may be that so much traffic is carried on the wireline network that it will be many years before wireless companies could divert more than a small percentage of total wireline usage, even if wireless service is priced competitively and wireless networks are fully "digitized." *See* Merrill Lynch & Co., Global Securities Research & Economics Group, *Wireless in the United States: Making Inroads*, at 2 (even if wireless rates fell by two-thirds in the ten years after 1994, their rates would still be three times higher than for existing wireline services) (July 25, 1994). For a more optimistic analysis of the ability of wireless networks to divert significant capacity from wireline ones, see Robert G. Harris, Gregory L. Rosston, and David J. Teece, *Competition in Local Telecommunications: Implications of Unbundling for Antitrust Policy*, paper presented to the Telecommunications Policy Research Conference, at 8-15 (Oct. 3, 1994).

156 These two indicators also differ somewhat in their treatment of certain costs.

157 *See* Franklin M. Fisher and John J. McGowan, *Firm Interdependence in Oligopolistic Markets*, 73 AM. ECON. REV. 82 (1983); William F. Long and David Ravenscraft, *Misuses of Accounting* Rates *of Return: Comment*, 74 AM. ECON. REV. 494 (1984); Stephen Martin, *Misuses of Accounting Rates of Return: Comment*, 74 AM. ECON. REV. 501 (1984).

158 David Ravenscraft, *Structure-Profit Relationships at the Line of Business and Industry Level*, REV. OF ECON. AND STATS., at 22-31 (Feb. 1993).

159 JEFFREY K. MACKIE-MASON, *Do Firms Care Who Provides Their Financing?*, in Asymmetric Information, Corporate Finance, and Investment (R. Glenn Hubbard ed., 1990), at 63-103.

160 SHARON M. OSTER, *Modern Competitive Analysis* 9-12 (Oxford University Press, 2d ed. 1994).

these elements of CMRS are on the growth curve, without necessarily implying the existence of supra-competitive returns and market power.

79. Currently, there is available evidence on accounting rates of return from two types of sources. First, three states included detailed information in their petitions to continue rate regulation of certain CMRS providers. Table 9 contains after-tax rates of return for twenty-three cellular carriers between 1989 and 1993 as reported to the CPUC.[161] The base is net plant and equipment. Interest expenses are excluded. Table 10 contains after-tax, pre-interest rates of return on the regulated portion of five cellular carriers (one, GTE, is present in four markets) as reported by the Hawaii Public Utilities Commission. Table 11 contains ranges and averages of return on common equity as reported by the New York State Public Service Commission.

80. Second, a number of stock analysts publish reports that include financial data about "wireless companies," a category including many providers discussed in this *Report*. Table 12 shows the operating cash flow margins of several companies for fourteen quarters as reported by Merrill Lynch. Table 13 shows returns on revenues, assets and equity as reported by Standard and Poor's.

81. In general, Tables 9 through 13 show contradictory results, which indicates a rather heterogenous industry. Many firms, especially ones serving large metropolitan areas, are earning economic rents of significant proportions. At the same time, some providers in those same markets fare quite poorly. More broadly, no cellular system is known to have ceased operations. This indicates a business worth being in, *i.e.*, a profitable business. On the other hand, the Commission is unaware of any "stand-alone" cellular company that has paid a dividend, which indicates that any profits are being re-invested for growth and that the industry has not yet achieved stability.

4. Entry

82. The possibility of entry by new competitors is widely recognized as a constraint on monopolistic conduct (high prices, low quality, failure to innovate) by incumbent providers.[162] Previous Sections of this *Report* discuss the possible emergence of interconnected SMRs as competitors for cellular in two-way mobile telephone service. In addition, the first competition from broadband PCS is almost certain to take the form of mobile telephone service. The *GAO Report* noted that PCS, if it were not dominated in each market by the existing cellular providers there, "would seem to serve the public interest by providing additional competition and potentially lower prices for consumers."[163] Estimates of the eventual downward impact of broadband PCS entry on cellular prices range as high as forty percent in the next two years.[164] Due to the flexibility of the Commission's definition of PCS, the broadband licensees will also be able to follow whatever incentives the market gives them to compete in other areas, such as dispatch, paging, and combinations of the service categories discussed in this *Report*. Narrowband PCS, with its advanced messaging services, is likely to increase the present degree of competition between cellular service and paging

[161] Tbl. 9 contains average rates of return for the State as a whole. To calculate these, two regressions were used, both shown in Tbl. 14.

[162] *See, e.g., United States v. Waste Management, Inc.*, 743 F.2d 976, 982-83 (2d Cir. 1984). *See also* American Bar Association, *I Antitrust Law Developments* 307-11, and cases cited therein (Third ed. 1992); and *California State Petition R&O* at ¶ 32 & nn.85-86.

[163] *GAO Report, supra* note 140, at 4.

[164] *See, e.g.*, authority cited *supra* note 38; COMM. DAILY, Apr. 24, 1995.

service. Unlicensed PCS and, somewhat further in the future, satellite-based systems will also create more potential for competition in CMRS.

83. Finally, the federal government is in the process of re-allocating 200 MHz from government use to private sector uses.[165] The Commission has allocated the first fifty of those MHz, including allocations of twenty-five MHz for unspecified fixed and mobile radio services.[166] The Commission has proposed that the latter allocation be for a General Wireless Communications Service, which may be CMRS.[167] This type of flexible allocation attempts to allow the free market to determine the best use of spectrum. Thus, the Commission expects long term allocations to permit relatively free entry into and exit from any segment of CMRS, placing further competitive pressures on existing CMRS providers.

### 5. Conclusions

84. The evidence described in the preceding paragraphs points to several findings and conclusions, which are consistent with those in the preceding Section of this *Report*. While the mobile telephone service segment of the CMRS business is not fully competitive, it generally appears that such economic rents as are being earned are being re-invested to continue the growth of a service that consumers clearly want. Entry by several new layers of competition for all existing providers is certain, and more such entry is feasible in the following years. The rise of competitive forces is now being achieved largely by the private sector. It has been made possible, however, by the Commission's deliberate dismantling of an old regulatory structure, which emphasized service classifications, and the creation of a new structure whose hallmark is flexibility, with regulation focused on protecting consumers by stimulating competitive forces.

## IV. ADMINISTRATIVE MATTERS

85. Consistent with the requirement that the Commission annually report to Congress on the status of competition, the Commission plans to submit future *Reports* to Congress by June 30th of each year.

86. This *Report* is issued pursuant to authority contained in Section 332 (c)(1)(C) of the Communications Act of 1934, as amended, 47 U.S.C. § 332 (c)(1)(C).

87. It is ORDERED that the Secretary shall send copies of this *Report* to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[165] Budget Act, § 113(b), (e)(2)(A).

[166] *See Government Re-Allocation*, cited *supra* note 101.

[167] Another service that might be used in the future for CMRS is Local Multipoint Distribution Service, which is now proposed principally for fixed broadband video, telecommunications, and data communications. *See generally, Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration*, 8 FCC Rcd 557, 561 & n.10 (¶ 26 & n.10) (1993); and *Second Notice of Proposed Rulemaking*, 9 FCC Rcd 1394 (1994).

# TABLES

**Table 1**
**Cellular Growth**

| Year | Subscribers at Year End | % Subscriber Growth | Revenues | % Revenue Growth |
|---|---|---|---|---|
| 1984 | 91,600 | | $178,085,000* | |
| 1985 | 340,213 | 271.41% | $482,428,000 | 170.90% |
| 1986 | 681,825 | 100.41% | $823,052,000 | 70.61% |
| 1987 | 1,230,855 | 80.52% | $1,151,519,000 | 39.91% |
| 1988 | 2,069,441 | 68.13% | $1,959,548,000 | 70.17% |
| 1989 | 3,508,944 | 69.56% | $3,340,595,000 | 70.48% |
| 1990 | 5,283,055 | 50.56% | $4,548,820,000 | 36.17% |
| 1991 | 7,557,148 | 43.05% | $5,708,522,000 | 25.49% |
| 1992 | 11,032,753 | 45.99% | $7,822,726,000 | 37.04% |
| 1993 | 16,009,461 | 45.11% | $10,892,165,000 | 39.24% |
| 1994 | 24,134,421 | 50.75% | $14,229,921,000 | 30.64% |

* Six month revenues.

Source: Cellular Telecommunications Industry Association, *1994 Wireless Industry Survey Results: "American Success Story" Continues* (1995).

**Table 2**
**Licensees for Broadband PCS Blocks A and B**

| Market | Block | Licensee | Population (millions) | Bid ($millions) |
|---|---|---|---|---|
| New York | B | WirelessCo, LP | 26.4 | 443 |
| Los Angeles-San Diego | B | Pacific Telesis | 19.1 | 494 |
| Chicago | A | AT&T Wireless PCS | 12.0 | 373 |
| Chicago | B | PCS PRIMECO | 12.0 | 385 |
| San Francisco-Oakland-San Jose | A | WirelessCo, LP | 11.9 | 207 |
| San Francisco-Oakland-San Jose | B | Pacific Telesis | 11.9 | 202 |
| Detroit | A | AT&T Wireless PCS | 10.0 | 81 |
| Detroit | B | WirelessCo, LP | 10.0 | 86 |
| Charlotte-Greensboro-Greenville-Raleigh | A | AT&T Wireless PCS | 9.8 | 67 |
| Charlotte-Greensboro-Greenville-Raleigh | B | BellSouth | 9.8 | 71 |
| Dallas-Ft. Worth | A | PCS PRIMECO | 9.7 | 88 |
| Dallas-Ft. Worth | B | WirelessCo, LP | 9.7 | 88 |
| Boston-Providence | A | AT&T Wireless PCS | 9.5 | 122 |
| Boston-Providence | B | WirelessCo, LP | 9.5 | 127 |
| Philadelphia | A | AT&T Wireless PCS | 8.9 | 81 |
| Philadelphia | B | PhillieCo | 8.9 | 85 |
| Washington-Baltimore | B | AT&T Wireless PCS | 7.8 | 212 |
| Atlanta | A | AT&T Wireless PCS | 6.9 | 198 |
| Atlanta | B | GTE Macro | 6.9 | 185 |
| Minneapolis-St. Paul | A | WirelessCo, LP | 6.0 | 40 |
| Minneapolis-St. Paul | B | APT | 6.0 | 37 |
| Tampa-St. Petersburg-Orlando | A | APT | 5.4 | 90 |
| Tampa-St. Petersburg-Orlando | B | PCS PRIMECO | 5.4 | 99 |
| Houston | A | APT | 5.2 | 84 |
| Houston | B | PCS PRIMECO | 5.2 | 83 |
| Miami-Fort Lauderdale | A | WirelessCo, LP | 5.1 | 132 |
| Miami-Fort Lauderdale | B | PCS PRIMECO | 5.1 | 126 |

**Table 2**
**(continued)**

| Market | Block | Licensee | Population (millions) | Bid ($millions) |
|---|---|---|---|---|
| Cleveland | A | Ameritech | 4.9 | 87 |
| Cleveland | B | AT&T Wireless PCS | 4.9 | 86 |
| New Orleans-Baton Rouge | A | WirelessCo, LP | 4.9 | 94 |
| New Orleans-Baton Rouge | B | PCS PRIMECO | 4.9 | 89 |
| Cincinnati-Dayton | A | AT&T Wireless PCS | 4.7 | 42 |
| Cincinnati-Dayton | B | GTE Macro | 4.7 | 43 |
| St. Louis | A | AT&T Wireless PCS | 4.7 | 119 |
| St. Louis | B | WirelessCo, LP | 4.7 | 114 |
| Milwaukee | A | WirelessCo, LP | 4.5 | 85 |
| Milwaukee | B | PCS PRIMECO | 4.5 | 86 |
| Pittsburgh | A | WirelessCo, LP | 4.1 | 29 |
| Pittsburgh | B | APT | 4.1 | 32 |
| Denver | A | WirelessCo, LP | 3.9 | 64 |
| Denver | B | GTE Macro | 3.9 | 65 |
| Richmond-Norfolk | A | AT&T Wireless PCS | 3.8 | 34 |
| Richmond-Norfolk | B | PCS PRIMECO | 3.8 | 33 |
| Seattle (Excluding Alaska) | A | GTE Macro | 3.8 | 106 |
| Seattle (Excluding Alaska) | B | WirelessCo, LP | 3.8 | 105 |
| Puerto Rico-U.S. Virgin Islands | A | AT&T Wireless PCS | 3.6 | 57 |
| Puerto Rico-U.S. Virgin Islands | B | Centennial Cellular | 3.6 | 55 |
| Louisville-Lexington-Evansville | A | AT&T Wireless PCS | 3.6 | 49 |
| Louisville-Lexington-Evansville | B | WirelessCo, LP | 3.6 | 47 |
| Phoenix | A | AT&T Wireless PCS | 3.5 | 78 |
| Phoenix | B | WirelessCo, LP | 3.5 | 76 |
| Memphis-Jackson | A | Powertel PCS | 3.5 | 43 |
| Memphis-Jackson | B | Southwestern Bell | 3.5 | 43 |
| Birmingham | A | WirelessCo, LP | 3.2 | 36 |
| Birmingham | B | Powertel PCS | 3.2 | 35 |

**Table 2**
**(continued)**

| Market | Block | Licensee | Population (millions) | Bid ($millions) |
|---|---|---|---|---|
| Portland | A | Western PCS | 3.1 | 34 |
| Portland | B | WirelessCo, LP | 3.1 | 34 |
| Indianapolis | A | WirelessCo, LP | 3.0 | 70 |
| Indianapolis | B | Ameritech | 3.0 | 71 |
| Des Moines-Quad Cities | A | Western PCS | 3.0 | 22 |
| Des Moines-Quad Cities | B | WirelessCo, LP | 3.0 | 21 |
| San Antonio | A | WirelessCo, LP | 3.0 | 54 |
| San Antonio | B | PCS PRIMECO | 3.0 | 52 |
| Kansas City | A | WirelessCo, LP | 2.9 | 24 |
| Kansas City | B | APT | 2.9 | 24 |
| Buffalo-Rochester | A | WirelessCo, LP | 2.8 | 19 |
| Buffalo-Rochester | B | AT&T Wireless PCS | 2.8 | 20 |
| Salt Lake City | A | Western PCS | 2.6 | 46 |
| Salt Lake City | B | WirelessCo, LP | 2.6 | 46 |
| Jacksonville | A | Powertel PCS | 2.3 | 46 |
| Jacksonville | B | PCS PRIMECO | 2.3 | 45 |
| Columbus | A | AT&T Wireless PCS | 2.1 | 22 |
| Columbus | B | APT | 2.1 | 22 |
| El Paso-Albuquerque | A | Western PCS | 2.1 | 9 |
| El Paso-Albuquerque | B | AT&T Wireless PCS | 2.1 | 9 |
| Little Rock | A | Southwestern Bell | 2.1 | 13 |
| Little Rock | B | WirelessCo, LP | 2.1 | 12 |
| Oklahoma City | A | Western PCS | 1.9 | 11 |
| Oklahoma City | B | WirelessCo, LP | 1.9 | 13 |
| Spokane-Billings | A | Poka Lambro | 1.9 | 6 |
| Spokane-Billings | B | WirelessCo, LP | 1.9 | 6 |

**Table 2**
**(continued)**

| Market | Block | Licensee | Population (millions) | Bid ($millions) |
|---|---|---|---|---|
| Nashville | A | WirelessCo, LP | 1.8 | 16 |
| Nashville | B | AT&T Wireless PCS | 1.8 | 16 |
| Knoxville | A | AT&T Wireless PCS | 1.7 | 11 |
| Knoxville | B | BellSouth | 1.7 | 11 |
| Omaha | A | AT&T Wireless PCS | 1.7 | 5 |
| Omaha | B | Cox Cable | 1.7 | 5 |
| Wichita | A | AT&T Wireless PCS | 1.1 | 4 |
| Wichita | B | WirelessCo, LP | 1.1 | 5 |
| Honolulu | A | Western PCS | 1.1 | 22 |
| Honolulu | B | PCS PRIMECO | 1.1 | 22 |
| Tulsa | A | Southwestern Bell | 1.1 | 18 |
| Tulsa | B | WirelessCo, LP | 1.1 | 17 |
| Alaska | A | APT | .6 | 1 |
| Alaska | B | GCI Communication | .6 | 2 |
| Guam-Northern Mariana Islands | A | Poka Lambro | .2 | .1 |
| Guam-Northern Mariana Islands | B | APT | .2 | .1 |
| American Samoa | A | South Seas Satellite | .05 | .2 |
| American Samoa | B | Communications Intl | .05 | .2 |

**Table 2**
**(continued)**

| Pioneer's Preference Holders | | | | |
|---|---|---|---|---|
| **Market** | **Block** | **Pioneer** | **Population (Millions)** | **Required Payment ($Millions)** |
| New York | A | Omnipoint Corp. | 26.4 | 347 |
| Los Angeles | A | Cox Communications | 19.1 | 251 |
| Washington-Baltimore | A | American Personal | 7.7 | 102 |

Notes: PCS PRIMECO is a joint venture of Nynex, Bell Atlantic, AirTouch and US West. WirelessCo is a joint venture of Sprint and the cable television system operators Comcast, Cox, and TCI.

Source: *FCC Auction, December 5, 1994, Broadband Personal Communications Services, Major Trading Area Licenses Frequency Blocks A & B, Bidder's Information Package; Public Notice, Auctions*, FCC (Mar. 13, 1995).

**Table 3***
**California 14 Carrier Monthly "Best Price" Indices**

| Year | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|
| Best Price | | | | |
| 60 | $63.03 | $63.03 | $62.95 | $58.48 |
| 120 | $85.09 | $84.95 | $84.87 | $76.93 |
| 480 | $219.42 | $218.05 | $216.76 | $191.06 |

**Table 4***
**California 11 Carrier Monthly "Best Price" Indices**

| Year | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| Best Price | | | | | |
| 60 | $64.72 | $63.12 | $63.12 | $63.10 | $58.60 |
| 120 | $87.89 | $85.19 | $85.06 | $85.04 | $77.05 |
| 480 | $226.64 | $219.67 | $218.29 | $217.17 | $191.31 |

**Table 5***
**California 14 Carrier Annual Operating Expense Indices**

| Year | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|
| Annual Per Subscriber Operating Expense | $701.53 | $699.51 | $662.11 | $589.63 |

**Table 6***
**California 11 Carrier Annual Operating Expense Indices**

| Year | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| Annual Per Subscriber Operating Expense | $685.43 | $669.79 | $680.01 | $654.76 | $586.10 |

*Source: *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates, Report & Order,* PR Docket No. 94-105, (FCC 95-195) (May 19, 1995), App. B at 2-3 ("*California State Petition R&O*"), *reconsideration denied, Order on Reconsideration* (FCC 95-345) (Aug. 9, 1995). Averages are weighted by number of subscribers in 1991. Prices assume eighty percent of minutes are peak-use minutes.

**Table 7**
**Los Angeles "Best Prices"**

| | Single User | | | Best Volume Discount Price | | |
|---|---|---|---|---|---|---|
| | 60 minutes | 120 minutes | 480 minutes | 60 minutes | 120 minutes | 480 minutes |
| 12/31/93 | 69.84 | 85.08 | 201.60 | 56.86 | 75.96 | 198.72 |
| 12/31/94 | 56.39 | 85.08 | 201.60 | 56.86 | 75.96 | 198.72 |
| 2/28/95 | 56.39 | 84.03 | 200.72 | 49.49 | 69.98 | 185.90 |

The technique used to develop this table is similar to that used by the State of California and the cellular carriers commenting on California's petition to continue rate regulation of cellular carriers. These are best available prices for a new user on the given day. The best price is not necessarily the same for both carriers. The price shown is the best available from some carrier for a new customer. This table shows that prices have fallen since the data provided by California. For example, the best price for sixty minutes fell nineteen percent between December 31, 1993, and December 31, 1994. This was due to a new rate plan and a temporary promotional plan that was available for the first few months the new rate plan was available.

Sources: *California State Petition R&O*, App. B at 4, and *ex parte* presentations of AirTouch (Mar. 17, 1995) and BellSouth (Mar. 23, 1995).

**Table 8**
**Cellular Prices for 160 Minutes in 29 Top Markets**

| MSA | Population | 1985 Price | 1994 Price | % Change |
|---|---|---|---|---|
| Los Angeles | 13,862,513 | $111.24 | $99.99 | -10.11 |
| New York | 13,698,478 | $104.00 | $110.77 | 6.51 |
| Chicago | 7,261,176 | $70.10 | $58.82 | -16.09 |
| Philadelphia | 4,856,881 | $97.60 | $80.98 | -17.03 |
| Boston | 4,029,662 | $84.02 | $82.16 | -2.21 |
| Dallas | 3,949,075 | $90.68 | $59.78 | -34.08 |
| San Francisco | 3,686,592 | $109.00 | $99.47 | -8.74 |
| Washington, DC | 3,660,758 | $78.94 | $76.89 | -2.60 |
| Houston | 3,493,644 | $91.32 | $80.33 | -12.03 |
| Miami | 3,192,582 | $114.00 | $94.76 | -16.88 |
| Atlanta | 2,695,480 | $110.80 | $86.73 | -21.72 |
| San Diego | 2,498,016 | $93.88 | $83.85 | -10.68 |
| Minneapolis | 2,438,203 | $102.83 | $75.98 | -26.11 |
| St. Louis | 2,423,560 | $80.74 | $67.97 | -15.82 |
| Baltimore | 2,348,219 | $77.74 | $76.89 | -1.09 |
| Detroit | 2,265,818 | $57.22 | $66.76 | 16.67 |
| Phoenix | 2,122,101 | $108.27 | $79.52 | -26.55 |
| Pittsburgh | 2,097,447 | $103.14 | $69.87 | -32.26 |
| Seattle | 1,972,961 | $108.27 | $83.06 | -23.28 |
| Tampa | 1,966,844 | $91.32 | $87.95 | -3.69 |
| Denver | 1,851,389 | $108.27 | $73.74 | -31.89 |
| Cleveland | 1,831,122 | $88.74 | $79.11 | -10.85 |
| San Jose | 1,497,577 | $109.00 | $99.47 | -8.74 |
| Portland | 1,457,344 | $89.49 | $66.36 | -25.85 |
| Kansas City | 1,447,336 | $76.16 | $75.37 | -1.04 |
| Milwaukee | 1,432,149 | $71.59 | $57.04 | -20.32 |
| Sacramento | 1,355,107 | $56.80 | $61.36 | 8.03 |
| San Antonio | 1,302,099 | $85.68 | $59.97 | -30.01 |
| Cincinnati | 726,322 | $74.40 | $65.67 | -11.73 |

Price is best available package for 160 minutes (eighty percent peak).
Sources: *Ex parte* presentation of Prof. Jerry Hausman for AirTouch, PR Docket 94-105 (Mar. 9, 1995); and Cellular Telecommunications Industry Association, *The Wireless Marketbook.*

**Table 9**
**Average After Tax Rates of Return on Cellular (in %) in California on Net Plant and Equipment**

| Company | Starting Date | Population | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|---|---|
| Bakersfield Cellular | 3/88 | 543,477 | | | | | 61.5 |
| Bay Area Cellular | 9/86 | 5,184,169 | 43.7 | 48.1 | 43.5 | 31.1 | 49.5 |
| Cagal Cellular | 1/89 | 388,222 | | 1.2 | 17.6 | 17.0 | 35.8 |
| California 2 Cellular | 8/91 | 57,015 | | | -49.0 | -55.0 | |
| Contel Cellular of CA (RSA # 7) | 10/90 | 109,303 | | -32.2 | -19.5 | 6.0 | 35.4 |
| Fresno Cellular | 10/87 | 979,411 | -19.6 | 11.9 | 24.0 | 31.3 | 25.7 |
| Fresno MSA LP | 4/86 | 1,624,357 | | 8.0 | 7.6 | 11.2 | 10.7 |
| GTE Mobilnet of California | 3/85 | 6,826,133 | 22.8 | 15.8 | 16.4 | 20.0 | 18.1 |
| GTE Mobilnet of Santa Barbara | 11/87 | 369,608 | 2.6 | 2.0 | 8.5 | 6.7 | 7.5 |
| Los Angeles Cellular | 12/86 | 13,862,513 | 71.4 | 58.5 | 52.4 | 51.6 | 47.0 |
| LA SMSA LP | 6/84 | 14,531,529 | 49.4 | 43.3 | 34.8 | 28.0 | 33.8 |
| McCaw Communications of Stockton | 12/87 | 857,150 | | 31.4 | 27.0 | 26.0 | 32.2 |
| Modoc RSA LP | 10/90 | 57,015 | | -15.0 | -24.4 | -19.2 | -6.2 |
| Napa Cellular | 4/88 | 451,186 | | 7.4 | 19.5 | 32.7 | 32.5 |
| PacTel Cellular | 8/85 | 2,498,016 | 33.0 | 32.9 | 23.9 | 21.4 | 30.4 |
| Redding Cellular | 3/89 | 237,734 | | | | | 3.1 |
| Sacramento Cellular | 10/87 | 1,477,750 | -2.9 | 21.4 | 22.1 | 22.2 | 17.4 |
| Sacramento Valley LP | 7/85 | 2,836,582 | 17.6 | 10.1 | 2.8 | 0.8 | 6.4 |
| Salinas Cellular | 3/89 | 355,660 | | -21.6 | -8.3 | 5.2 | 7.2 |
| Santa Barbara Cellular | 12/87 | 369,608 | -39.4 | -10.4 | -9.7 | 5.0 | 10.5 |
| Santa Cruz | 1/89 | 229,734 | | | -2.7 | 9.5 | 14.0 |
| US West Cellular | 4/86 | 2,498,016 | 5.2 | 9.0 | -4.3 | -7.4 | 2.9 |
| Ventura Cellular | 7/87 | 669,016 | | 39.3 | 27.1 | 21.5 | 24.5 |
| Weighted Sum | | | 34.4 | 33.2 | 28.7 | 26.7 | 30.2 |

Weighted sum is by gross investment. Regressions 1 and 2 in Table 14 were used to provide estimates for the missing markets.

Source: Cellular Communications Licensees (Wholesalers) Annual Reports to the Public Utilities Commission, State of California, for the Years 1989, 1990, 1993; *California State Petition R&O*, App. B at 1.

**Table 10**
**Hawaii After-Tax Rates of Return**

| Company-Market | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| GTE Mobilnet, Inc. - Hilo | NA | NA | 5.10% | -10.06% | -12.20% |
| GTE Mobilnet, Inc. - Maui | NA | NA | 22.82% | 1.01% | 3.93% |
| GTE Mobilnet, Inc. - Oahu | NA | NA | -18.40% | -2.25% | 8.55% |
| GTE Mobilnet, Inc. - Kauai | NA | NA | 6.87% | -8.78% | -4.79% |
| USCOC of Hawaii 3, Inc - Island of Hawaii | NA | NA | -22.76% | -4.20% | 2.59% |
| Maui Cellular Telephone Co. - Maui | NA | NA | NA | NA | -10.11% |
| Honolulu Cellular Company - Oahu | 8.95% | 12.53% | 24.14% | 43.12% | 43.73% |
| Cybertel Cellular - Kauai | NA | NA | -28.66% | 5.45% | 36.97% |
| Average After-Tax (Weighted By Average Net Plant and Equipment) | | | | 14.15% | 19.64% |

Sources: *Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, Report & Order*, PR Docket No. 94-103, (FCC 95-194) at App. B at 1 (May 19, 1995). Hawaii provided pre-tax rates of return. The average net plant is average over full year. The effective tax-rate used for this table is 38.22% (34% Federal, 6.4% State).

**Table 11**
**New York State Return on Common Equity**

| Year | Low | High | Average |
|---|---|---|---|
| 1991 | -42% | 142% | 47% |
| 1992 | -118% | 85% | 39% |
| 1993 (est.) | 0% | 79% | 38% |

Source: *Petition to Extend Rate Regulation*, New York State Public Service Commission, PR Docket No. 94-108, at 8-9 (filed Aug. 8, 1994).

**Table 12**
**Selected Company Operating Cash Flow Margins**

| Cash Flow Margin | Q1 91 | Q2 91 | Q3 91 | Q4 91 | Q1 92 | Q2 92 | Q3 92 | Q4 92 | Q1 93 | Q2 93 | Q3 93 | Q4 93 | Q1 94 | Q2 94 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| BellSouth | 31.4% | 30.4% | 31.7% | 27.5% | 40.5% | 43.6% | 42.3% | 39.4% | 41.4% | 42.8% | 41.3% | 42.5% | 42.8% | 44.6% |
| Cellular Comm. | 39.9% | 45.3% | 41.6% | 37.2% | 39.4% | 44.5% | 44.6% | 41.8% | 44.3% | 48.9% | 44.3% | 40.9% | 40.6% | 46.0% |
| Cellular Comm. of PR | | -624% | -113% | -93.0% | -49.6% | -20.8% | -29.6% | -30.4% | -38.4% | -19.6% | -14.1% | 3.4% | 17.0% | 27.2% |
| CommNet Inc. | -277% | -102% | -145% | -79.1% | -91.9% | -40.5% | -13.5% | -20.9% | -22.6% | 12.9% | 21.3% | 13.2% | 8.6% | 26.0% |
| Centennial Cellular | 8.8% | 21.6% | 16.5% | 20.0% | 14.7% | 32.5% | 37.0% | 35.5% | 35.1% | 47.8% | 45.4% | 41.3% | 42.3% | 49.0% |
| Century Telephone | -15.8% | 5.5% | 13.0% | 16.7% | 15.4% | 22.3% | 32.6% | 23.9% | 26.7% | 30.2% | 30.9% | 13.9% | 32.1% | 34.3% |
| Contel Cellular | 6.5% | 21.7% | 20.9% | 9.4% | 15.2% | 19.4% | 21.8% | 12.9% | 22.2% | 30.4% | 29.7% | 11.2% | 24.4% | 32.5% |
| GTE Mobilnet | 20.6% | 29.0% | 29.0% | 20.7% | 24.7% | 22.6% | 34.2% | 27.5% | 30.2% | 35.0% | 36.1% | 20.2% | 31.0% | 35.9% |
| LIN Broadcasting | 47.2% | 49.6% | 48.9% | 44.6% | 44.5% | 49.1% | 51.2% | 46.9% | 47.7% | 48.8% | 49.2% | 43.6% | 38.1% | 44.6% |
| McCaw Cellular | 38.2% | 42.0% | 42.0% | 39.1% | 40.9% | 45.8% | 46.8% | 43.8% | 45.1% | 46.9% | 47.7% | 40.6% | 40.9% | 41.5% |
| McCaw Cellular Only | 35.0% | 39.3% | 39.7% | 37.1% | 39.6% | 44.6% | 45.4% | 42.9% | 44.2% | 46.3% | 47.2% | 39.7% | 41.8% | 40.5% |
| Nynex | 26.1% | 33.1% | 31.2% | 24.4% | 29.1% | 41.3% | 36.0% | 36.0% | 31.0% | 32.7% | 32.2% | -25.7% | 20.7% | 19.0% |
| AirTouch | 44.9% | 43.3% | 41.8% | 40.0% | 44.5% | 38.3% | 40.1% | 37.2% | 40.9% | 44.9% | 46.4% | 38.7% | 46.1% | 46.9% |
| Sprint | 9.3% | 15.7% | 16.5% | 11.5% | 11.3% | 17.9% | 18.0% | 20.2% | 23.2% | 25.2% | 17.2% | 24.5% | 24.5% | 27.5% |
| US Cellular | | | | | | | | | 16.1% | 23.3% | 20.9% | 16.1% | 21.6% | 27.4% |
| Vanguard Cellular | -4.0% | 2.2% | 14.1% | 12.3% | 9.8% | 22.0% | 22.5% | 20.4% | 22.6% | 27% | 31.1% | 20.7% | 22.5% | 27.5% |

Source: Merrill Lynch, *United States: Telecommunications/Cellular*, Table 7 (1994).



**Table 13**
**Rates of Return After Taxes and Interest Payments**

**Table 13**
**Rates of Return After Taxes and Interest Payments**

| | Return on Revenues (%) | | | | | Return on Assets (%) | | | | | Return on Equity (%) | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Wireless Service Company | 1989 | 1990 | 1991 | 1992 | 1993 | 1989 | 1990 | 1991 | 1992 | 1993 | 1989 | 1990 | 1991 | 1992 | 1993 |
| Airtouch Communications Inc. | NA | NA | NA | NM | 3.8 | NA | NA | NA | NM | 1.2 | NA | NA | NA | NM | 3.8 |
| Lin Broadcasting | 22.9 | NM | NM | NM | NM | 9.1 | NM | NM | NM | NM | 12.5 | NM | NM | NM | NM |
| McCaw Cellular Communications | NM | 35.8 | NM | NM | NM | NM | 6.3 | NM | NM | NM | NM | 23.0 | NM | NM | NM |
| Mobile Telecommunications Tech | NM | NM | NM | NM | 12.9 | NM | NM | NM | NM | 5.8 | NM | NM | NM | NM | 9.0 |
| Nextel Communications | NA | NM | NM | NM | NA | NA | NM | NM | NM | NA | NA | NM | NM | NM | NA |
| US Cellular Corp | NM | NM | NM | 3.8 | NM | NM | NM | NM | 0.8 | NM | NM | NM | NM | 1.5 | NM |
| Vanguard Cellular Sys. | NM | NM | NM | NM | NM | NM | NM | NM | NM | NM | NM | NM | NM | NM | NM |

8888

Source: Standard and Poor's, *Industry Surveys:Telecommunications, Basic Analysis* (1994); *see also California State Petition R&O*, App. B at 7.

**Table 14**

**Technical Appendix**

To obtain an estimate for the rate of return for the whole State of California, we used the following two regressions to estimate rate of return and gross plant:

**Regression No. 1**

Dependent Variable is Ln (GROSS PLANT)

| | Coefficient | Std. Error | T-Statistic | Prob. |
|---|---|---|---|---|
| Constant | 0.379602 | 1.642788 | 0.231072 | 0.8178 |
| Ln (YEAR-1983) | 1.553820 | 0.474709 | 3.273203 | 0.0015 |
| Ln (POPS) | 0.957653 | 0.059366 | 16.13130 | 0.0000 |
| RSA | -0.819740 | 0.231829 | -3.535974 | 0.0006 |
| Ln (Age) | -0.359661 | 0.296603 | -1.212601 | 0.2284 |
| Ln (Age)2 | 0.089599 | 0.067273 | 1.331876 | 0.1862 |
| Wireline | -0.142455 | 0.096554 | -1.475390 | 0.1436 |

| | |
|---|---|
| Observations: | 98 |
| R-squared | 0.963382 |
| Adjusted R-squared | 0.960967 |

**Regression No. 2**

Dependent Variable is Ln (Rate Of Return+100)

| | Coefficient | Std. Error | T-Statistic | Prob. |
|---|---|---|---|---|
| Constant | 0.962987 | 0.613016 | 1.570900 | 0.1196 |
| Ln (Pops) | 0.162373 | 0.023126 | 7.021266 | 0.0000 |
| Wireline | 0.039833 | 0.028285 | 1.408258 | 0.1624 |
| Min (0,Age-48) | -0.010266 | 0.001800 | -5.703254 | 0.0000 |
| Max (0,48-Age) | -0.000992 | 0.001927 | -0.514704 | 0.6080 |
| ln (High Income) | 0.045439 | 0.052989 | 0.857512 | 0.3933 |
| ln (Year - 1983) | 0.821929 | 0.149831 | 5.485705 | 0.0000 |

| | |
|---|---|
| Observations: | 101 |
| R-squared | 0.639238 |
| Adjusted R-squared | 0.616210 |

"Age" is the number of months since construction of the system. "Pops'' is the population based on the 1990 census. "High Income'' is the percent of households with income greater than $50,000 in 1991. Sources: *California State Petition R&O*, App. B at 14; 1992 Survey of Buying Power Demographic USA, 1990 US Census and Cellular Communications Licensees (Wholesalers) Annual Reports to the Public Utilities Commission, State of California.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of

File No. BRH-880729YC

CORDES STREET COMMUNICATIONS, INC.

For Renewal of License of
Station WAVF-FM,
Hanahan, South Carolina

## MEMORANDUM OPINION AND ORDER

**Adopted: July 31, 1995** **Released: August 18, 1995**

By the Commission:

### I. INTRODUCTION

1. The Commission has before it a Petition for Reconsideration ("Petition") of the Memorandum Opinion and Order and Notice of Apparent Liability, Dailey and Reich, 6 FCC Rcd 4672 (1991) ("Order"), filed by the South Carolina State Conference of Branches of the National Association for the Advancement of Colored People and its respective branches ("NAACP") and the National Black Media Coalition ("NBMC") (collectively, "NAACP/NBMC"). Also before the Commission is an Opposition to Petition for Reconsideration filed by Cordes Street Communications, Inc. ("Cordes"), licensee of Station WAVF-FM, Hanahan, South Carolina, and NAACP/NBMC's reply thereto.

2. In our Order, we found no evidence that the licensee of Station WAVF-FM had engaged in discrimination and concluded that there was no substantial and material question of fact warranting a hearing. We did, however, find Cordes' EEO efforts during the license term to be deficient and, on that basis, granted a short-term renewal, imposed reporting conditions, and issued a Notice of Apparent Liability for Forfeiture for $13,000. NAACP/NBMC argue that Station WAVF-FM's renewal application should be designated for hearing and subsequently denied. For the reasons stated below, we deny NAACP/NBMC's Petition.

### II. STANDING

3. The NBMC failed to support its Petition to Deny with an affidavit from a person who is a resident of Station WAVF-FM's service area or a listener of the station. Thus, we held in the Order that the NBMC lacked standing to file a petition to deny against the renewal application of Station WAVF-FM, and we treated the NBMC's Petition to Deny as an informal objection.[1] The NBMC does not challenge our holding in this regard. As an informal objector, the NBMC has no standing to seek reconsideration of the Order because it failed to meet the criteria set forth in Section 1.106(b)(1) of the Commission's Rules. 47 C.F.R. § 1.106(b)(1). License Renewal Applications, 7 FCC Rcd 6045 (1992). However, as the Petition for Reconsideration was filed by both the NBMC and the NAACP, which has appropriate standing, we will consider the arguments raised therein, recognizing only the NAACP as the petitioner.

### III. DISCUSSION

4. Reconsideration is appropriate where the petitioner demonstrates either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. See WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). 47 C.F.R. § 1.106(c). Applying this standard, we

[1] Petitions to Deny must be supported with an affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. § 309(d)(1). Affidavits from any person who is not a resident of the station's area or a listener of the station, do not satisfy the requirements for standing to challenge the license renewal of a station. See Michigan/Ohio Broadcast Renewals, 3 FCC Rcd 6944 (1988).

find there are no grounds for reconsideration of our Order. However, to clarify the record, we address the NAACP's arguments.

5. The NAACP argues that the Commission made three errors. First, the NAACP asserts that the Commission failed to consider two of its pleadings. Second, the NAACP contends that the Commission improperly characterized Station WAVF-FM's EEO efforts as better than those of the licensee in Woolfson Broadcasting Corporation of Salisbury/Ocean City, Inc., 4 FCC Rcd 6160 (1989). Finally, the NAACP asserts that the facts of this case raise substantial and material questions of discrimination to warrant designation for hearing.

**A. Alleged Failure to Consider All Evidence**

6. The NAACP alleges that the Commission overlooked two of its pleadings -- a Reply to Oppositions to Petitions to Deny, filed February 2, 1989, and a November 7, 1989, reply to the licensee's responses to staff letters of inquiry ("Inquiry Reply"). The Order does not refer to either of these two pleadings. Both of these pleadings were filed in connection with our investigations of the EEO efforts of a number of South Carolina licensees, including Station WAVF-FM. After considering the specific arguments made against Station WAVF-FM, we conclude that even if the pleadings were not factored into our decision, such an oversight would be harmless error.

7. The Reply to Oppositions only briefly addressed Station WAVF-FM and did not present any new facts or raise any new allegations. Rather, it simply stated that the station's past record does not "bode well for any subsequent renewal terms" and questions whether or not this "new licensee . . . [will] take FCC regulatory efforts very seriously."

8. The Inquiry Reply is devoted mostly to a general statistical analysis, based on Title VII of the Civil Rights Act, which the NAACP argues demonstrates a high probability of discrimination by Station WAVF-FM. As indicated above, this pleading was submitted in connection with Commission inquiries to a number of South Carolina licensees. We have already considered and rejected the NAACP's statistical analysis in Certain Broadcast Stations Serving the State of South Carolina, 5 FCC Rcd 1704, 1709, n. 4 (1990), petition for recon. denied, Ogden Broadcasting of South Carolina, Inc., 7 FCC Rcd 1895 (1992), petition for recon. pending (WKZQ AM/FM). In that case, we questioned the validity of an analysis based on Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), because the analysis dealt with Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a), not the FCC's EEO Rules.[2] Subsequently, in License Renewal Applications, 7 FCC Rcd 6045 (1992) and Pasco Pinellas Broadcasting, 8 FCC Rcd 398 (1993), aff'd sub nom. Florida State Conference of NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994), the Commission rejected similar statistical analyses, holding that calculations based on computations used in cases brought under Title VII of the Civil Rights Act instead of the Commission's EEO Rules are not determinative. The United States Court of Appeals for the D. C. Circuit has refused to overturn our position in this regard, deferring instead to the Commission's discretion. Id. at 274, n. 4.

9. In any event, the NAACP's analysis of Station WAVF-FM's recruitment efforts is flawed. The NAACP refuses to acknowledge the recruitment and hiring of a minority full-time employee as a copywriter during the license term, because she was recruited and hired after the filing of the renewal application. As discussed below, we believe consideration of that hire is appropriate, particularly since the minority employee was recruited and hired before the filing of the Petition to Deny.

[2] In addition, in Certain Broadcast Stations Serving the State of South Carolina, we concluded that the NAACP/NBMC had not established a prima facie case of discrimination because they had not identified a specific practice which could have resulted in the alleged statistical disparity. 5 FCC Rcd at 1709, n. 4. As was true in that case, the NAACP has provided us with no such information with regard to Station WAVF-FM.

10. The remainder of the NAACP's Inquiry Reply is equally without merit. In the instant Petition for Reconsideration, the NAACP states that its Inquiry Reply "put the Commission on notice that there is a reasonable doubt that the 'copywriter' . . . was properly classified as a 'professional.'" However, such notice consisted only of a single unsubstantiated sentence in a footnote, indicating that "[p]etitioners understand this to be a clerical, not a professional position." The Inquiry Reply contains no support for this bald assertion, nor does the NAACP provide any support for this allegation in its Petition for Reconsideration. As Cordes notes, writers are ordinarily considered professionals for purposes of completing Broadcast Annual Employment Reports.

### B. Comparison to Woolfson

11. The NAACP argues that the Commission improperly characterizes Station WAVF-FM's record as better than that of the licensee in Woolfson Broadcasting Corporation of Salisbury/Ocean City, Inc., 4 FCC Rcd 6160 (1989) ("Woolfson"). In Woolfson, we found that the licensee had not hired any minorities, did not successfully utilize recruitment sources to obtain minority referrals, did not undertake a meaningful reevaluation or self-assessment of its recruitment efforts, and failed to retain the two minority full-time employees hired by the former licensee. Based on these findings, the Commission granted a short-term renewal, assessed reporting requirements, and issued a $15,000 forfeiture.

12. In comparing WAVF-FM's EEO efforts with those of the licensee in Woolfson, we found that Station WAVF-FM's record was slightly better in that it recruited and hired a minority full-time employee, albeit after the filing of its renewal application. In addition, we recognized that in Woolfson, the two minority full-time employees hired by the former owner left the station shortly after its acquisition by the licensee, a circumstance which does not exist in this case. Finally, we took note of Station WAVF-FM's assertions that its owner has been active in minority business enterprise and training programs in the community.

13. Citing NBMC v. FCC, 775 F.2d 342 (D.C. Cir. 1985), the NAACP contends that we cannot credit Station WAVF-FM for hiring a minority employee after the filing of its renewal application. This is particularly true, it argues, since the licensee's attorney put the station on notice that it needed to improve its EEO efforts. We disagree. Although the lateness of the hiring of a minority full-time employee is a fact of note when considering what action, if any, to take against the licensee, it does not completely discredit the hire. In reviewing a licensee's EEO[3] record, it is the Commission's policy to consider all efforts made during the license term. See NBMC v. FCC, 775 F.2d at 350-51. The minority employee at issue was recruited and hired during the license term. In addition, it is significant that she was recruited and hired prior to the filing of the Petition to Deny and the Commission's issuance of letters of inquiry. Further, we do not find the letters from counsel to be significant, especially since both were standard client letters and neither evaluated the specific EEO performance of Station WAVF-FM.[3]

14. The NAACP next argues that, like the licensee in Woolfson, Cordes failed to retain minority employees. However, in Woolfson, all of the station's minority employees left the station after it was acquired by a new licensee and the station did not employ any more during the license term. In this case, on the other hand, the departure of minority employees from Station WAVF-FM cannot be linked to acquisition by a different licensee. Furthermore, Cordes did hire minorities in the license term. Finally, it is significant that in this case the departing minorities were part-time

[3] The letters from counsel were not previously filed in this proceeding, although they were apparently available to the NAACP. Thus, pursuant to Section 1.106(c) of our rules, they need not be considered at this time. We have nevertheless reviewed and considered them.

employees whereas in Woolfson the departing employees, one of whom was only a temporary intern, were both full-time.[4]

15. The NAACP also points out that the station in Woolfson is located in an area with a smaller percentage of Blacks in the labor force. This is true, but it is not, in and of itself, dispositive. The NAACP also asserts that the licensee in Woolfson used two minority recruitment sources and received two minority referrals, while Cordes did not use any minority recruitment sources or receive any minority referrals until the "twilight of its renewal term." However, in fact, the licensee in Woolfson used referral sources for less than half of its hires. In addition, while admittedly late in the license term, Station WAVF-FM also received two minority referrals. Finally, Station WAVF-FM evaluated its recruitment efforts late in the license term, but before the filing of the Petition to Deny, and began listing openings in four publications, two of which were minority-oriented.

16. While the facts of Woolfson are similar to those of this case, better in some respects and worse in others, we continue to believe that Station WAVF-FM had a better overall EEO record, albeit only slightly. In both cases we imposed short-term renewals and reporting conditions, and we differed only in the imposition of a slightly lower forfeiture ($13,000 as opposed to $15,000) against Station WAVF-FM. Based on the facts of both cases, we continue to believe that the imposition of a slightly smaller forfeiture was warranted in this case. Further, as Cordes points out, even if we were to accept the NAACP's arguments that Station WAVF-FM's record is slightly worse than that of the licensee in Woolfson, we would not, as the NAACP requests, designate the renewal application for hearing.

### C. Request for Hearing Designation

17. The NAACP argues that the Commission erred in not designating Station WAVF-FM's renewal application for hearing. In support of its contention, the NAACP, citing Beaumont, asserts that unanswered questions about the termination of a Black part-time employee hired in 1985, together with the "overwhelming statistical inference of discrimination," require designation of the renewal application for hearing. Specifically, the NAACP contends that Cordes was evasive in its response to Commission inquiries regarding a Black part-time employee hired on March 17, 1985, and employed until July 7, 1985. It also points to the fact that the FCC sent a second letter of inquiry, arguing that Cordes' responses to the second inquiry failed to resolve all outstanding issues.[5] Finally, citing WXBM-FM, Inc., 6 FCC Rcd 4782 (1991), the NAACP contends that the Commission must investigate further to resolve outstanding questions, alleging that further investigation will reveal evidence of misrepresentation and discrimination.

18. In Beaumont, the United States Court of Appeals for the District of Columbia Circuit ordered a hearing in light of the unexplained departures of seven Black employees, the licensee's inconsistent statements to the Commission regarding its employment practices, and the licensee's failure to maintain an EEO program. In WXBM-FM, Inc., the Commission designated the renewal application for hearing because of

[4] Contrary to the NAACP's assertions, this case is not similar to Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC, 854 F.2d 501 (D.C. Cir. 1988) ("Beaumont"). In Beaumont, there were unexplained departures of seven Black employees. There is not, in this case, such a conspicuous departure of minorities en masse. See also Florida State Conference of NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994).

[5] The NAACP argues that the Commission's May 1989 letter found a prima facie case of discrimination and that nothing in the licensee's response rebutted that finding. However, the NAACP's interpretation of our letter is incorrect. In that letter we merely indicated that questions existed and sought further information from the licensee. We did not find a prima facie case of discrimination.

inconsistent responses by the licensee and questions of misrepresentation. In that case, the Commission specifically held that the licensee's poor EEO efforts, viewed by themselves, "would not necessarily lead us to designate for hearing," but that a hearing was warranted "particularly [because of] the numerous inconsistent responses." WXBM-FM, Inc., 6 FCC Rcd at 4784.

19. Unlike Beaumont and WXBM-FM, Inc., there is no evidence in this proceeding of numerous inconsistencies or other indicia of misrepresentation to the Commission. We remain satisfied with Cordes' answers to our letters of inquiry and do not believe that any material questions remain which warrant designation for hearing. Cordes has explained its lack of knowledge regarding the minority part-time employee who left station employment in 1985, pointing to its change of management and staff since that time.[6] Accordingly, we find this case to be substantially different from Beaumont and WXBM-FM, Inc.

20. After reviewing the record, we continue to believe that no hearing is warranted. There is no evidence in the record of discrimination. There was no sudden departure of minority employees. Moreover, there is no evidence that Cordes has made any misrepresentations to the Commission regarding its employment practices.

## IV. CONCLUSION AND ORDERING CLAUSE

21. The NAACP has presented no new evidence to support its contention that the licensee's EEO record warrants designation for hearing or sanctions other than those imposed in the Order. In addition, it has failed to show any material error or omission in the Order. We find that the original Order, imposing a short-term renewal, reporting conditions, and a Notice of Apparent Liability for Forfeiture for $13,000 was appropriate.[7]

22. Accordingly, IT IS ORDERED that the Petition for Reconsideration as to the NBMC IS DISMISSED and as to the NAACP IS DENIED.

23. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested, copies of this Memorandum Opinion and Order to the NBMC, the NAACP, and the licensee.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton,
Acting Secretary

[6] We do not, as the NAACP suggests, condone poor record keeping, but find, given the facts of this case, that Station WAVF-FM's lack of records is not grounds for designation for hearing. We have, however, taken other appropriate action against Cordes for its failure to maintain adequate records necessary to comply with our EEO Rules. In addition, we do not believe, as the NAACP contends, that the licensee's lack of knowledge regarding station hires indicates that control of the station was abdicated to the former manager. There is nothing in the record which raises a substantial and material question regarding control of the station.

[7] We note that Cordes has already paid the forfeiture amount in full.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CC Docket No. 95-95

American Cablesystems of
Florida, Ltd., d/b/a Continental
Cablevision of Broward County, and

Continental Cablevision of
Jacksonville, Inc. PA 91-0012

Complainants,

v.

Florida Power and Light Company

Respondent

## ORDER

**Adopted: August 8, 1995 Released: August 17, 1995**

By the Chief, Common Carrier Bureau:

1. On July 5, 1995, Florida Power and Light Company (Florida Power) filed a "Petition for Clarification and Reconsideration" of our Order designating this pole attachment complaint proceeding for a hearing before an Administrative Law Judge (ALJ).[1] In that Order, we determined that the pole attachment rates Florida Power charges American Cablesystems of Florida, Ltd., d/b/a Continental Cablevision of Broward County, and Continental Cablevision of Jacksonville, Inc. (collectively, Continental) should reflect Florida Power's underground plant expenses.[2] Florida Power seeks reconsideration of that determination and, in the event we do not grant reconsideration, clarification regarding the issues referred to the ALJ.

2. To the extent Florida Power seeks reconsideration of the *Hearing Designation Order*, Section 1.106(a)(1) of the Commission's rules[3] bars its petition. That rule makes clear that we will not entertain petitions for reconsideration of interlocutory actions, such as hearing designation orders, except insofar as a petition relates to a ruling denying the petitioner's request to participate in a proceeding.[4] Therefore, we dismiss Florida Power's petition for reconsideration without prejudice to the reassertion of the underground plant expense issue after the completion of the proceedings before the ALJ.

3. To the extent Florida Power seeks clarification of our *Hearing Designation Order*, it asks whether the ALJ may resolve the underground plant expense issue *de novo* and, if not, whether the only issue before the ALJ will concern the refunds due complainants. Both answers are no. The complaint in this proceeding concerns the pole attachment rates Florida Power has charged complainants since August 4, 1992.[5] The *Hearing Designation Order* required Florida Power and Continental to file with the Commission, and serve on each other, data relevant to the issue of whether those rates exceeded the maximum amounts allowable under Commission rules. Although the ALJ will have considerable discretion in addressing this issue,[6] our resolution of the underground plant expense issue will be binding on him.[7]

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[1] American Cablesystems of Florida, Ltd. v. Florida Power and Light Co., DA 95-1364 (Com. Car. Bur. released June 15, 1995) (*Hearing Designation Order*).

[2] *Id.* at para. 10.

[3] 47 C.F.R. §1.106(a)(1).

[4] *Id.*

[5] *Hearing Designation Order*, para. 1.

[6] *Id.* at paras. 11, 14.

[7] *See id.* at paras. 12-13 & 18.

4. Accordingly, **IT IS ORDERED**, pursuant to Sections 0.91, 0.291, and 1.106(a)(1) of the Commission's rules, 47 C.F.R. §§0.91, 0.291, & 1.106(a)(1), that the Petition for Reconsideration and Clarification Florida Power and Light Company filed on July 5, 1995, **IS DISMISSED** to the extent it seeks reconsideration of the *Hearing Designation Order* and otherwise **IS DENIED**.

**FEDERAL COMMUNICATIONS COMMISSION**

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Cellular Marketing Inc.,
Complainant, File No. WB/ENF-F-95-003
(No. E-89-273)

v.

Houston Cellular Telephone Company,
Defendant

## ORDER

**Adopted: August 7, 1995 Released: August 18, 1995**

By the Chief, Enforcement Division:

1. This proceeding was initiated on June 22, 1989 with the filing of a formal complaint, pursuant to Section 208 of the Communications Act, by Cellular Marketing, Inc. (CMI) against Houston Cellular Telephone Company (HCTC). Therein, CMI alleged that HCTC had violated Sections 201(b) and 202(a) of the Communications Act and the Commission's policies concerning the provision of resale of cellular services. This lengthy proceeding has been characterized by intermittent periods of procedural activity and period when proceedings were stayed to facilitate settlement negotiations.

2. In January 1995 the responsibility for this proceeding was transferred from the Common Carrier Bureau to the Wireless Telecommunications Bureau. In a status conference held thereafter, on March 13, 1995, the parties were directed to file pleadings updating their positions on pending discovery motions by April 10,1995. The defendant made a timely filing of this pleading, i.e., "Defendant's Second Motion To Stay and Renewed Opposition To Motion To Compel, dated April 10, 1995". Defendant also filed its "Third Motion to Dismiss" on that date. CMI's attorney, on the other hand, submitted only a letter informing the Commission that CMI had filed for bankruptcy and that, accordingly he was unable to file a pleading on behalf of CMI. Thereafter on April 17, 1995, defendant filed a supplement to its motion to dismiss in which it argues that CMI's complaint also should be dismissed in the light of its failure to prosecute it.

3. Upon learning of the identity of the Trustees appointed in the CMI Bankruptcy proceeding, on May 8, 1995, we sent a letter to him in which we stated that"... although we believe that it is appropriate under the circumstances to accord you a reasonable opportunity to determine whether it is in the interest of the debtor's estate to prosecute this proceeding, it is our intention to conclude the proceeding expeditiously". Wherefore, we directed the Trustee to notify the Commission by May 29, 1995, whether he intended to continue to prosecute CMI's complaint and, if he chose to do so, he was further directed to file responsive pleadings by June 19, 1995, to defendant's "Second Motion to Stay And Renewed Opposition To Motion To Compel", Third Motion To Dismiss" and "Supplement To Defendant's Third Motion To Dismiss". The Trustee did not comply with these filing dates. However, on June 19, 1995 he notified the Commission that he had determined to abandon the instant CMI complaint against HCTC as part of the bankruptcy estate, effective July 7, 1995. It is our understanding that in accordance with 11 U.S.C., Section 554(a), upon such abandonment the "ownership" in and the responsibility for the prosecution of the instant complaint has reverted back to the complainant, CMI.

4. Wherefore, on June 26, 1995, we sent a letter directing it to notify the Commission and defendant's counsel by July 10, 1995 whether it intended to continue to prosecute this complaint. Subsequent filing dates were also established for the complainant to submit its response to the pending motions filed by the defendant, which are described above in paragraph 2. The complainant has not complied with these directives or otherwise

responded to the letter. The June 26, 1995 letter was mailed to the last address provided to the Commission by complainant through its attorney for service upon the complainant in this proceeding. However, the postal service was unable to deliver the letter because the addressee was no longer at that address.

5. Finally, on July 18, 1995, the defendant filed a letter, herein, in which it requests that the Commission dismiss CMI's complaint with prejudice for failure to prosecute.[1] No opposition or other pleading in response to defendant's July 18, 1995 letter has been filed.

6. Although our June 26, 1995 letter could not be delivered to complainant by the postal service because it was no longer at the last address provided by it to the Commission, we hold that the complainant, nevertheless, received at least constructive notice of the directives contained in the June 26, 1995 letter. Complainant was required by Section 1.720(g) of the Commission's Rules to notify the Commission of any change of its address. In addition Section 1.47 (d) of the Rules provides that service of documents may be completed by "mailing a copy to the last known address." Moreover, because copies of the letter were also sent to the attorney previously representing complainant in the proceeding, complainant's attorney in the bankruptcy proceeding and the trustee's attorney, it is probable that a responsible officer of complainant also received actual notice of the directive contained in the June 26, 1995 letter and that the absence of a response reflects a lack of interest by complainant in continuing to prosecute its complaint.

7. In light of the forgoing, it is apparent that complainant has ceased to pursue its complaint and that the complaint should therefore be dismissed for failure to prosecute.

8. WHEREFORE, IT IS ORDERED that, the above captioned complaint should IS DISMISSED WITH PREJUDICE and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard C. Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

[1] A copy of defendant's letter was mailed to complainant at its last known address as well as to complainant's last attorney in this proceeding, complainant's attorney in the bankruptcy proceeding, the trustee in the bankruptcy proceeding and the trustee's attorney.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

CLINTON CABLE TV, INC.

Petition for Revocation
of the Certification of Clinton County,
Kentucky Fiscal Court to Regulate
Basic Cable Rates (KY1098)

## MEMORANDUM OPINION AND ORDER

**Adopted: August 8, 1995 Released: August 17, 1995**

By the Chief, Cable Services Bureau:

## I. INTRODUCTION

1. On June 9, 1995, Clinton Cable TV, Inc. ("Clinton") filed a Petition for Special Relief[1] challenging the certification of the Clinton County, Kentucky Fiscal Court (the "County") to regulate rates for basic cable service and associated equipment.[2] The County did not file an opposition to Clinton's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-

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[1] Clinton styles its pleading as a "Petition for Special Relief" pursuant to Section 76.7 of the Commission's rules. 47 C.F.R. §76.7. However, the Commission's regulations explicitly provide two procedural avenues for certification challenges based on effective competition. The first procedural avenue, a petition for reconsideration, must be brought within 30 days of a franchising authority's certification. 47 C.F.R. §§1.106, 76.911. After the 30 days has elapsed, as is the case with Clinton's petition, a cable operator may bring a petition for revocation pursuant to Section 76.914 of the Commission's regulations. 47 C.F.R. §76.914. Accordingly, we will treat Clinton's petition as a petition for revocation of certification.

[2] The County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 13, 1993, which became effective November 13, 1993.

[3] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[4] 47 C.F.R. §§76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) ("*Rate Order*").

filed petition for reconsideration alleging the presence of effective competition.[7] After the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge the franchising authority's certification by filing a petition for revocation.[8] However, regardless of its grounds, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[9]

## II. DISCUSSION

3. Clinton states that its system is subject to effective competition because it serves fewer than 30 percent of the households within its franchise area, Clinton County, Kentucky.[10] Specifically, Clinton asserts that it "serves only 1,201 of the 4,189 occupied housing units in its franchise area, or 28.6 percent of the total number of occupied housing units."[11] As supporting documentation, Clinton provides a page from the 1990 Census which indicates that there are 4,189 housing units in the County. Clinton also submits a copy of a computer printout with sufficient subscriber information to support its claim that it serves 1,201 households in the franchise area.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[13] Clinton has not met this burden. The Census information submitted by Clinton indicates that the County contains 4,189 housing units (i.e., occupied and unoccupied housing units), rather than the number of households (i.e., occupied housing units) as required by our regulations.[14] We have referenced the appropriate 1990 Census household information which indicates that the County contains 3,591 households.[15] Clinton has submitted sufficient information demonstrating that its cable system serves 1,201 of the 3,591 households in its franchise area, or 33.44 percent of the total number of households. Based on this calculation, we find that Clinton's penetration rate exceeds the 30 percent threshold necessary to establish low penetration effective competition. Therefore, Clinton's petition must be denied.

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[7] 47 C.F.R. §76.911(c).

[8] 47 C.F.R. §76.914.

[9] 47 C.F.R. §76.914(d).

[10] The 1992 Cable Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 §623(a)(2), 47 U.S.C. §543(a)(2); 47 C.F.R. §76.905(a). One of the bases by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 §623(l)(1)(A), 47 U.S.C. §543(l)(1)(A); 47 C.F.R. §76.905(b)(1).

[11] Clinton Petition at 2.

[12] 47 C.F.R. §76.906.

[13] 47 C.F.R. §76.911(b)(1).

[14] As the Commission has stated, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of households in the 1990 Census reflects only occupied housing units. *See* Bureau of Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[15] The Commission has stated that 1990 Census data is an appropriate source for household data. *See Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

## III. ORDERING CLAUSES

5. Accordingly, **IT IS ORDERED** that the Petition for Revocation filed by Clinton Cable TV, Inc. challenging the certification of the Clinton County, Kentucky Fiscal Court **IS DENIED.**

6. This action is taken pursuant to authority delegated under Section 0.321 of the Commission's rules.[16]

**FEDERAL COMMUNICATIONS COMMISSION**

Meredith J. Jones
Chief, Cable Services Bureau

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[16] 47 C.F.R. §0.321.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

GLOBALSTAR INTERNATIONAL, INC.
d/b/a GSI TELECOM

Application for authority to acquire and operate facilities for service to various overseas points. File No. I-T-C-95-392

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: August 11, 1995 Released: August 16, 1995**

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File no. I-T-C-95-392 IS GRANTED, and GlobalStar International, Inc. d/b/a GSI Telecom (GSI) is authorized to:

a. acquire on an Indefeasible Right of User (IRU) basis a one-half interest in and operate the cable facilities set forth in the Appendix hereto:

b. lease and operate any necessary domestic connecting facilities;

c. lease a one-half interest in and operate any necessary overseas connecting facilities; and

d. use said facilities to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendix hereto.

3. IT IS FURTHER ORDERED that neither GSI nor any persons or companies directly or indirectly controlling or controlled by GSI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which GSI or any persons or companies controlling or controlled by GSI are parties.

4. IT IS FURTHER ORDERED that our authorization of GSI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and one of the countries listed in the Appendix hereto -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendix hereto or which originate in one of the countries listed in the Appendix hereto and terminate in the United States. In addition, GSI may not -- and GSI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with Regulation of International Accounting Rates, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), petition for reconsideration pending.

5. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the

filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license for the CANUS-1 cable system issued herein under the Act entitled "An Act relating to the landing and operation of submarine cables in the United States," 47 U.S.C. §§ 34-39.

9. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act of 1934, as amended, before adding any circuits or channels of communication for the provision of service over any private cable system in which circuits are authorized herein.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

**FEDERAL COMMUNICATIONS COMMISSION**

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

## APPENDIX

| Destination | Cable System | No. of Circuits |
|---|---|---|
| Austria | CANUS 1/CANTAT III/ | 1 E1 |
| Belgium | CANUS 1/CANTAT III/RIOJA | 1 E1 |
| | CANUS 1/CANTAT III/ODIN | 1 E1 |
| Canada | CANUS 1 | 1 E1 |
| Denmark | CANUS 1/CANTAT III | 1 E1 |
| Finland | CANUS 1/CANTAT III/ODIN | 1 E1 |
| ·ce | CANUS 1/CANTAT III/ODIN | 5 E1's |
| | CANUS 1/CANTAT III/RIOJA | 5 E1's |
| :y | CANUS 1/CANTAT III | 8 E1's |
| | CANUS 1/CANTAT III/ODIN | 8 E1's |
| Iceland | CANUS 1/CANTAT III | 2 E1's |
| Ireland | CANUS 1/CANTAT III | 1 E1 |
| Italy | CANUS 1/CANTAT III/ODIN | 2 E1's |
| | CANUS 1/CANTAT III/RIOJA | 2 E1's |
| :herlands | CANUS 1/CANTAT III/ODIN | 1 E1 |
| | CANUS 1/CANTAT III/ODIN | 2 E1's |
| al | CANUS 1/CANTAT III/ODIN | 1 E1 |
| | CANUS 1/CANTAT III/RIOJA | 1 E1 |
| ɔpain | CANUS 1/CANTAT III/ODIN | 3 E1's |
| | CANUS 1/CANTAT III/RIOJA | 3 E1's |
| Sweden | CANUS 1/CANTAT III/ODIN | 1 E1 |
| Switzerland | CANUS 1/CANTAT III/ODIN | 1 E1 |
| | CANUS 1/CANTAT III/RIOJA | 1 E1 |
| United Kingdom | CANUS 1/CANTAT III | 15 E1s |

THE PAPER AND INK USED IN THE ORIGINAL PUBLICATION MAY AFFECT THE QUALITY OF THE MICROFORM EDITION.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LETTER

August 15, 1995

Released: August 18, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

1800E

Max Television of Syracuse L.P.
Licensee, WSYT(TV)
900 Granby Street
Norfolk, VA 23510

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of twenty thousand dollars ($20,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, inter alia, limiting the amount of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Accordingly, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). Children's Television Programming, 6 FCC Rcd 2111, 2118, recon. granted in part, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. Children's Television Programming, 6 FCC Rcd 5529, 5530 (1991).

On January 31, 1994, you filed an application for renewal of license (FCC Form 303-S) for station WSYT(TV), Syracuse, NY (File No. BRCT-940131LJ). In a supplement you indicate that during the previous license term WSYT(TV) did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 3 to your application you state that between February 1 and February 16, 1993, WSYT(TV) exceeded the commercial limits on children's programming on 11 occasions. Of these 11 commercial overages, six were 30 seconds in length; two were one minute in length; two were 90 seconds in length; and one was two minutes in length. You state that all of these commercial overages occurred during the same clock hour on different days because of "a single mistake" in allocating commercial time in barter programming; that they all resulted from inadvertence and/or human error; and that the station instituted procedures to prevent recurrence. In addition, you state that in March, 1992, the station broadcast a commercial announcement for "Sunkist Tiny Toons Fruit Chews" during the program "Tiny Toons", and in June, 1992, the station broadcast a commercial announcement for "Teenage Mutant Ninja Turtles" toy figures during the program "Teenage Mutant Ninja Turtles"; and that, as a result of these two incidents, the station instituted a pre-screening procedure for all commercial announcements for children's programs. However, you further state that, despite the pre-screening procedure, a commercial announcement for "Kellogg's Honey Smacks cereal" featuring "Tale Spin" characters was

broadcast during the program "Tale Spin" on one occasion in August, 1992; and a commercial announcement for "Teenage Mutant Ninja Turtles" toy figures was broadcast during the program "Teenage Mutant Ninja Turtles" on 14 occasions between February 1 and March 1, 1993. Again, you assert that these incidents occurred because of human error, and that "additional measures" were taken to prevent recurrence. Finally, on April 26, 1994, you filed an amendment to WSYT(TV)'s renewal application in which you state that on March 19, 1994, during the program "Tazmania", the station broadcast a commercial announcement for "Kellogg's Raisin Bran" cereal which included an appearance by the program's "Taz" character. You further state that there was no indication of the character's appearance in the title of the announcement; that the station could not preview the spot before it aired because the network feed of the program is "live"; and that the station had no opportunity to delete the ad when it appeared because of the short duration of the "Taz" character's appearance.

WSYT(TV)'s record during the last license term of exceeding the Commission's commercial limits on children's television programming on 29 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Max Television of Syracuse L.P. is hereby advised of its apparent liability for forfeiture in the amount of twenty thousand dollars ($20,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. See, e.g., Koplar Communications, 8 FCC Rcd 7884 (1993); Independent Communications, Inc., 8 FCC Rcd 7886 (1993); KXRM Partnership, 8 FCC Rcd 7890 (1993). A recent decision by the U.S. Court of Appeals for the District of Columbia set aside Policy Statement - Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993)("Policy Statement/Assessing Forfeitures"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In United States Telephone Ass'n. v. FCC, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in Policy Statement/Assessing Forfeitures, supra, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under Policy Statement/Assessing Forfeitures, id., they were not inherently tied to Policy Statement/Assessing Forfeitures, id. Without regard to Policy Statement/Assessing Forfeitures, id., we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, inter alia, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. See Clear Channel Television, Inc. (KTTU(TV)), 10 FCC Rcd 3773 (1995); Northstar Television of Erie, Inc. (WSEE-TV), 10 FCC Rcd 3779 (1995).

The 29 occasions on which WSYT(TV) exceeded the hourly limits on commercial matter during children's programming is a high number of violations. Moreover, although six of the overages were 30 seconds or less in duration, five of the overages were one minute or longer, and 18 of the overages were program-length commercials. Congress was particularly concerned about program-length commercials because young

children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. Children's Television Programming, supra 6 FCC Rcd at 2117-18. In addition, when the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...[and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of transitional difficulties." Children's Television Programming, supra 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that would have prevented Station WSYT(TV) from complying with the children's television commercial limitations during the last license period. Indeed, you admit that all of the cited violations occurred because of human error and/or inadvertence. Thus, in view of the violations described in your renewal application, it is apparent that WSYT(TV) initially did not establish an effective program to monitor compliance with the children's television commercial limitations. Further, although you state that an additional pre-screening procedure was instituted after the second program-length commercial violation in June, 1992, additional program-length commercial violations occurred thereafter as a result of what you describe as "breakdown[s] in the station's procedures". Finally, the fact that WSYT(TV) may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for prior violations. See International Broadcasting Corp., 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $20,000.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith or that the violations reflect a deliberate disregard for Commission requirements. Rather, these violations reflect the licensee's failure to institute procedures sufficient to ensure compliance with the children's television commercial limitations. Accordingly, we do not believe that the violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station WSYT(TV) would serve the public interest, convenience and necessity. Therefore, the license renewal application of Max Television of Syracuse L.P., File No. BRCT-940131LJ, for Station WSYT(TV), Syracuse, NY, IS HEREBY GRANTED for a term to end on June 1, 1999.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure
cc: Mark Van Bergh, Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LETTER

August 15, 1995

Released: August 18, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

1800E

WWOR-TV, Inc.
9 Broadcast Plaza
Secaucus, NJ 07096

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of twelve thousand five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, inter alia, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). Children's Television Programming, 6 FCC Rcd 2111, 2118, recon. granted in part, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. Children's Television Programming, 6 FCC Rcd 5529, 5530 (1991).

On February 1, 1994, you filed an application for renewal of license (FCC Form 303-S) for station WWOR-TV, Secaucus, NJ (File No. BRCT-940201KX). In a supplement to that renewal application you state that during the previous license term WWOR-TV did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 9(c) to your application you state that between February 16, and September 6, 1992, WWOR-TV exceeded the commercial limitations on children's programming during 22 broadcasts of the "Bugs & Daffy Hour" cartoon program. Of these 22 "Bugs & Daffy" overages, Exhibit 9(c) states that nine were 45 seconds in length; three were 30 seconds in length; and ten were 15 seconds in length. (However, a WWOR-TV inter-office memo dated October 8, 1992, submitted as part of Exhibit 9(c), states that, between July 1, and September 30, 1992, six "Bugs and Daffy" cartoon programs exceeded the children's television commercial limits by one minute.) Exhibit 9(c) further states that, in September and October, 1992, the station exceeded the commercial limits during nine broadcasts of other cartoon programs. Of these nine overages, three were 60 seconds in length; one was 45 seconds in length; and five were 30 seconds in length. You state that these cartoon programs were edited by the station, and that the overages occurred because "[i]n certain instances, th[e] editing process left the program too short, and the remaining time was filled with commercial spots". In this regard, you assert that the station "promptly corrected this editing problem after identifying it in early October, 1992."

In addition, Exhibit 9(c) lists seven other instances where the station exceeded the children's television commercial limits: one 90-second overage on March 29, 1992; four 15-second overages in September-October, 1992; one 30-second overage on November 30, 1992; and one 15-second overage on May 2, 1993. You attribute these overages to inadvertence and/or human error. Finally, On October 7, 1994, you filed an amendment to your renewal application in which you state that the station "inadvertently broadcast a 30-second commercial involving Exosquad characters in the 'Exosquad' program" on September 15, 1994.[1]

WWOR-TV's record of exceeding the Commission's commercial limits on children's television programming on 39 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, WWOR-TV, Inc. is hereby advised of its apparent liability for forfeiture in the amount of twelve thousand five hundred dollars ($12,500) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. See, e.g., Koplar Communications, 8 FCC Rcd 7884 (1993); Independent Communications, Inc., 8 FCC Rcd 7886 (1993); KXRM Partnership, 8 FCC Rcd 7890 (1993). A recent decision by the U.S. Court of Appeals for the District of Columbia set aside Policy Statement - Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993)("Policy Statement/Assessing Forfeitures"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In United States Telephone Ass'n. v. FCC, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in Policy Statement/Assessing Forfeitures, supra, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under Policy Statement/Assessing Forfeitures, id., they were not inherently tied to Policy Statement/Assessing Forfeitures, id. Without regard to Policy Statement/Assessing Forfeitures, id., we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, inter alia, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. See Clear Channel Television, Inc. (KTTU(TV)), 10 FCC Rcd 3773 (1995); Northstar Television of Erie, Inc. (WSEE-TV), 10 FCC Rcd 3779 (1995).

The 39 occasions on which WWOR-TV exceeded the hourly limits on commercial matter during children's programming is a high number of violations. Moreover, as many as ten of the overages were 60 seconds or greater in duration, and one was a program-length commercial. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits

[1] This violation occurred after the expiration of the license term for which renewal is sought. However, since the station's renewal application is still pending, the violation is being considered in connection with the other violations listed in that application.

contemplated by Congress when it enacted the Children's Television Act of 1990. Children's Television Programming, supra 6 FCC Rcd at 2117-18.

In addition, when the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...[and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of transitional difficulties." Children's Television Programming, supra 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that would have prevented Station WWOR-TV from complying with the children's television commercial limitations during the last license period. Indeed, you admit that all of the cited violations occurred because of human error. Further, 31 of the commercial overages described in your renewal application occurred solely because WWOR-TV station personnel, when faced with edited cartoon programs too short to fill their time periods, merely filled in all available time with commercial matter without any apparent knowledge of or concern for the children's television commercial limitations. These violations began in February, 1992, and continued for a period of nine months, until October, 1992. Thus, it is apparent that WWOR-TV initially did not establish an effective program to monitor compliance with the children's television commercial limitations. Further, the fact that WWOR-TV may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for prior violations. See International Broadcasting Corp., 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $12,500.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, no further action is required in this matter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure
cc: William R. Richardson, Jr., Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LETTER

August 15, 1995

Released: August 18, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

WPIX, Inc.
220 East 42nd Street
New York, NY 10017

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars ($10,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, inter alia, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). Children's Television Programming, 6 FCC Rcd 2111, 2118, recon. granted in part, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. Children's Television Programming, 6 FCC Rcd 5529, 5530 (1991).

On February 1, 1994, you filed an application for renewal of license (FCC Form 303-S) for station WPIX(TV), New York, NY (File No. BRCT-940201LG). In a supplement to that renewal application you state that during the previous license term WPIX(TV) did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 4 to your application you reveal that between March 6, 1992, and November 17, 1993, WPIX(TV) exceeded the commercial limits on children's programming on 9 occasions. Of these 9 commercial overages, two were one minute or greater in length; two were thirty seconds or less in length; and five were program-length commercials. The Exhibit indicates that the commercial overages resulted from human error on the part of various members of the station's staff; and that after the first overage occurred on March 6, 1992, additional procedures to prevent recurrence were instituted.

WPIX(TV)'s record during the last license term of exceeding the Commission's commercial limits on children's television programming on 9 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, WPIX, Inc., is hereby advised of its apparent liability for forfeiture in the amount of ten thousand dollars ($10,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and,

in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. See, e.g., Koplar Communications, 8 FCC Rcd 7884 (1993); Independent Communications, Inc., 8 FCC Rcd 7886 (1993); KXRM Partnership, 8 FCC Rcd 7890 (1993). A recent decision by the U.S. Court of Appeals for the District of Columbia set aside Policy Statement - Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993)("Policy Statement/Assessing Forfeitures"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In United States Telephone Ass'n. v. FCC, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in Policy Statement/Assessing Forfeitures, supra, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under Policy Statement/Assessing Forfeitures, id., they were not inherently tied to Policy Statement/Assessing Forfeitures, id. Without regard to Policy Statement/Assessing Forfeitures, id., we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, inter alia, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. See Clear Channel Television, Inc. (KTTU(TV)), 10 FCC Rcd 3773 (1995); Northstar Television of Erie, Inc. (WSEE-TV), 10 FCC Rcd 3779 (1995).

When the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...." Children's Television Programming, 6 FCC Rcd at 5530 n.10. The commercial overages described in WPIX(TV)'s renewal application clearly indicate that WPIX(TV) did not initially establish an effective program to ensure compliance with the Commission's limits on commercial matter in children's programming. You have not proffered any extraordinary transitional or other difficulties which would have prevented WPIX(TV) from complying with the children's television commercial limitations during the last license period. Further, although your renewal application indicates that additional compliance procedures were instituted after the first overage on March 6, 1992, violations continued to occur through November 17, 1993. In addition, two of WPIX(TV)'s violations were one minute or greater in duration, and five were program-length commercials. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this nature and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. Children's Television Programming, 6 FCC Rcd at 2117-18. The only reason for the cited violations proffered by WPIX(TV), human error, does not justify or excuse such violations. Finally, the fact that now WPIX(TV) may have implemented a plan to prevent future violations of the Commission's children's television commercial limitations does not relieve the licensee of liability for violations which have occurred. International Broadcasting Corp., 19 FCC 2d 793, 794 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $10,000.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, no further action is required in this matter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure
cc: Paula G. Friedman, Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

RM-8158

Verilink Corporation's Petition for Rulemaking to Amend the Commission's Part 68 Rules toAuthorize Regulated Carriers to Provide Certain Line Build Out Functionality as a Part of Regulated Network Equipment on Customer Premises

Adopted: August 14, 1995 Released: August 17, 1995

## MEMORANDUM OPINION AND ORDER

By the Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. On December 14, 1992, Verilink Corporation, a manufacturer of telephone network diagnostic equipment, filed a Petition for Rulemaking with the Commission asking it to amend its Part 68 rules. Verilink would like the Commission to allow telephone common carriers to provide line build out (LBO) functionality[1] in the transmission path of DS1 services as a component of regulated network interface equipment located on customer premises. The proposed rule change would re-bundle LBO functionality with the regulated transmission services of the local exchange carrier, thus making regulated carriers responsible for adjusting the strength of the signal emitted by certain digital transmission customer premises equipment (CPE) and overriding any signal attenuation capability of competitively provided CPE. For the reasons discussed below, we deny Verilink's request.[2]

[1] Line build out functionality is defined in Paragraph 2 of this Order.

[2] Public Notice of the Petition appeared on January 8, 1993. Comments were filed by ten parties: The Ameritech Operating Companies (Ameritech), BellSouth Corporation (BellSouth), GTE Service Corporation (GTE), Independent Data Communications Manufacturers Association (IDCMA), Integrated Network Corporation (INC), Larus Corporation (Larus), Nynex Telephone Companies (NYNEX), Pacific Bell and Nevada Bell (Pacific Bell), PairGain Technologies, Inc. (PairGain), and Southwestern Bell Telephone Company (Southwestern Bell). Reply comments were filed by eight parties: IDCMA, INC, NYNEX, Pacific Bell, Southwestern Bell, Telecommunications Industry Association (TIA), United States Telephone Association (USTA), and Verilink. Informal comments were filed by the Utilities Telecommunications Council (UTC). The record closed on February 23, 1993.

## II. BACKGROUND

2. When the signal delivered by the CPE into the network exceeds acceptable levels, network harm can result in the form of "cross talk." Cross talk refers to noises heard in a channel when currents from one channel interfere with those of another. Cross talk can occur when pairs of wire are positioned parallel to each other in a cable. In a DS1 circuit,[3] LBO functionality attenuates, or reduces the intensity of, strong signals emitted by CPE where the distance between repeaters or between a repeater and the transmit/receive equipment may be short.[4] By attenuating the signal,

[3] Local exchange carriers provide some transport services using "dedicated" circuits -- circuits that are dedicated to the use of a particular interexchange carrier. Dedicated circuits vary in degrees of capacity, for example, "voice-grade circuits" have sufficient bandwith to carry a single voice conversation; "DS1 circuits" have 24 times the capacity of a voice-grade circuit; and "DS3 circuits" have 28 times the capacity of a DS1 circuit. A DS1 circuit operates at 1.544 million bits per second (Mbps). The Verilink Petition encompasses only DS1 service.

[4] A repeater is a mechanism that reconstructs and retransmits received pulses in the DS1 transmission path. Repeaters are generally placed every 6000 feet in the path of pulses traveling from the transmitting circuitry to the receiving circuitry in order to maintain a

LBO functionality prevents the signal power delivered by the CPE source device from being too high for the telephone company transport media to handle without creating cross talk. Currently, all network channel terminating equipment (NCTE) registered under Part 68 of the Commission's rules must be capable of performing LBO functionality.[5] A brief history of Commission and Bureau orders addressing the issue of unbundling of NCTE and NCTE functions provides the framework for our consideration of telephone common carrier provision of regulated LBO functionality.

3. *Unbundling of NCTE and NCTE functions.* The Commission first unbundled and detariffed NCTE from network facilities in 1983 in its *Interconnection Order I* decision.[6] In that proceeding, the Commission held that telephone common carriers had failed to justify restrictive tariff provisions prohibiting customers from providing their own terminal equipment employed in conjunction with carrier provided digital transmission services. Also in *Interconnection Order I*, the Commission predicted that high amplitude pulses or voltages emanating from unbundled data equipment represented a potential source of network harm, including the problem of cross talk.[7]

4. The Commission addressed this potential harm to the network in 1984 in *Interconnection Order II*, wherein it adopted amendments to Part 68 to establish attenuation requirements for NCTE connecting to the DS1 service.[8] The Commission amended its Part 68 rules at that time to require that all registered NCTE be capable of performing LBO functionality. Section 68.308(h)(2)(ii), as amended, identifies three signal attenuation settings for NCTE, options A, B and C with a value of 0 db, 7.5 db and 15 db, respectively, that can be selected at the time of installation.[9] Commenters in this proceeding use the term "joint engineering" to refer to the activities that occur between the telephone company or CPE manufacturer and the CPE installer to establish the appropriate A, B or C setting. Joint engineering may consist solely of a telephone call from the customer to the telephone company or CPE vendor or may require an onsite diagnostic visit to the customer premises by the telephone company or CPE vendor representative. Verilink's proposed amendment would delete reference to options B and C, leaving option A (at 0 db) as the only remaining LBO attenuation setting.

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strong and robust signal.

[5] Customer premises terminal equipment used in conjunction with carrier provided digital services is generally referred to as network channel terminating equipment (NCTE) or channel service units (CSU). The NCTE or CSU provides a controlled, amplitude balanced interface in a modified bipolar format to the customer's data equipment. By "bipolar," we mean the signalling method used for digital transmission services where the signal is carried in either one of two states, i.e., a zero or one.

[6] Amendment of the Commission's Rules Concerning Connection of Equipment, Systems and Protective Apparatus to the Telephone Network, *Notice of Proposed Rulemaking*, 94 FCC 2d 5 (1983), *recon. denied*, FCC 84-145 (1984) *(Interconnection Order I)*.

[7] *Interconnection Order I*, 94 FCC 2d at 19.

[8] *Second Report and Order*, 49 Fed. Reg. 48714 (1984), *recon.*, FCC 85-564 (1985) *(Interconnection Order II)*.

[9] Section 68.308(h)(2)(ii) provides that:

> registered terminal equipment shall be capable of optionally delivering three sizes of output pulses. The output pulse option shall be selectable at the time of installation.

47 C.F.R. § 68.308(h)(2)(ii). The circuitry that performs the attenuation and includes the three selectable output pulses (options A, B, and C) is referred to as LBO and the actual attenuation is commonly termed LBO functionality.

5. In 1985, in the *Computer Inquiry III* proceeding,[10] the Commission considered whether, along with other enumerated NCTE functions, "signal conditioning" was an NCTE function that should migrate to the network side of the demarcation point to allow telephone company provision of this function on a regulated basis.[11] The "signal conditioning" referred to in that proceeding encompasses the function that Verilink and the present parties now call LBO. The Commission concluded that only "loopback testing" would be accorded special regulatory status and specifically declined to permit tariffed provision of other NCTE functions by carriers through network equipment placed on customer premises.[12]

6. In the more recent *BellSouth* proceeding,[13] the Common Carrier Bureau considered the identical issue raised in the present Petition. In that proceeding, BellSouth petitioned the Commission for a declaratory ruling or, in the alternative, a waiver of the Commission's rules that would permit it to provide LBO functionality as a component of the regulated network interface connectors on customer premises and, thus, facilitate implementation of the then-current industry standard.[14] The Bureau denied BellSouth's petition for declaratory relief on the grounds that the petition did not identify a genuine controversy or uncertainty regarding the interpretation of the existing rules, which the Bureau found to expressly include LBO as a function of CPE.[15] The Bureau then denied BellSouth's request for a waiver, indicating that a decision to grant the waiver would invite numerous other waiver requests, which, if granted, would effectively circumvent the Commission's rulemaking function.[16]

7. While the Common Carrier Bureau indicated that the record in the BellSouth proceeding supported a finding that BellSouth's proposed

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[10] See In the Matter of Amendment to Sections 64.702 of the Commission's Rules and Regulations *(Computer Inquiry III) Notice of Proposed Rulemaking (Computer III NPRM)*, 50 Fed. Reg. 33602 (August 20, 1985); *Supplemental Notice of Proposed Rulemaking, Phase II (Supplemental Notice)*, 60 R.R. 2d 603 (1986); *Report and Order (Computer III Phase II Order)*, 2 FCC Rcd 3072 (1987), *recon. (Computer III Phase II Reconsideration)*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1988); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991); *vacated in part*, California v. FCC, 39 F.3d 919 (9th Cir. 1994); In the Matter of Amendment of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, *Notice of Proposed Rulemaking*, CC Docket No. 95-20, FCC 95-48, rel. Feb. 21, 1995.

[11] *Computer III Phase II Order*, 2 FCC Rcd at 3105.

[12] Loopback testing is a diagnostic capability that, when provided by equipment on the carrier side of the demarcation point, permits carriers to distinguish technical problems in customer-owned inside wiring and CPE from problems in the network plant, without the necessity of dispatching a service technician. Id.

[13] BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Build Out Functionality as a Component of Regulated Network Interface Connectors on Customer Premises, *Memorandum Opinion and Order*, 6 FCC Rcd 3336 (Com. Car. Bur. 1991) *(BellSouth Order)*.

[14] The standard that BellSouth sought to implement was the American National Standard for Telecommunications-Carrier to Customer Installation - DS 1 Metallic Interface BSR T1.403 (ANSI DS1 standard). The standard called for a single pulse template and a uniform signal level from the NCTE to the network interface.

[15] *BellSouth Order*, 6 FCC Rcd at 3342.

[16] Id. at 3343.

implementation of a standard metallic interface for DS1 service (the then-current industry standard) would eliminate the need for joint engineering, it determined that such a proposal must be sought in a rulemaking proceeding. Therefore, based on the record developed in the *BellSouth* proceeding, the Bureau set forth guidelines for parties to follow if they sought to receive authority to implement this standard and provide LBO functionality re-bundled with the regulated transmission services of the local exchange carrier.[17] Verilink addresses the issues raised by those guidelines in the present Petition for Rulemaking.

8. Since the filing of the Verilink Petition, the Commission had occasion to revisit the issue of detariffing and unbundling of data communications CPE in the *NYNEX Enterprise* proceeding.[18] In *NYNEX Enterprise*, the Commission reaffirmed its commitment to the policy of unbundling, stating that:

> [t]he underlying rationale for the Commission's procompetitive CPE policies and rules remains as valid today as it was during the Computer II Decisions. The classification of user-provided equipment as unregulated CPE has benefitted data communications network users in numerous ways. The resulting increased competition among manufacturers has driven improvements in equipment quality, lowered CPE prices, and improved the performance of users' data communications networks.[19]

## III. POSITIONS OF THE PARTIES

9. Verilink contends that regulated provision of LBO functionality in the DS1 transmission path would eliminate the need for the joint engineering process between customers and carriers or customers and manufacturers that is used to set LBO levels at installation. Verilink maintains that the proposed rule amendment, which would permit only a single output pulse setting on NCTE and bring the Commission's rules into line with the ANSI DS1 standard, would eliminate a source of unnecessary user confusion and expense, as well as alleviate the network harm that arises from customer misadjustments of the current three LBO settings.[20] Verilink states that, although "product manuals provided with equipment typically include explicit instructions, users often do not follow the instructions or do not interpret the instructions accurately."[21] Verilink indicates that customers then seek assistance from manufacturers like Verilink to determine the appropriate LBO setting.[22] Verilink estimates that it spends approximately $40,000 a year to provide this customer assistance.[23]

10. Verilink contends that the DS1 service should be treated differently from other digital or analog services in that the DS1 data rate is higher by a factor of thirty over the next highest data rate for other digital or analog services regulated under Part 68, which are termed subrate services. Verilink argues that due to the high speed of the DS1 service, DS1 transmissions allegedly are prone to more

[17] Id. at 3343-44.

[18] In the Matter of Nynex Telephone Companies Tariff F.C.C. No. 1 Applications for Review, *Memorandum Opinion and Order*, 9 FCC Rcd 1608 (1994) *(NYNEX Enterprise)*.

[19] Id. (footnotes omitted).

[20] Petition at 8-9.

[21] Id. at 8.

[22] Id.

[23] Verilink states that it experiences approximately 40 incidences of installation difficulties per year that require that personnel be dispatched to the customer site. In these cases, Verilink states that it incurs airfare and other expenses at an average cost of $1000 per incident for a total cost of approximately $40,000 per year. Id. at 10.

ubiquitous technical problems that require more joint engineering. According to Verilink, these special characteristics of the DS1 service support a "plug and play" approach pursuant to which customers should be provided only a single LBO setting on their NCTE.[24]

11. Verilink notes that its proposed amendment would align the Commission's rules with technical standards for digital services and equipment and facilitate the introduction and deployment of advanced transmission services in the public switched network.[25] Finally, Verilink asserts that the proposed amendments would not impair competition in the data communications CPE market and would benefit CPE customers, network users and the manufacturing industry as a whole.[26] It suggests that if the proposed amendments were adopted, customers may benefit by a slight reduction in the price of CPE and possibly by a reduction in the tariffed rates for DS1 services in light of the administrative savings that are expected to result from the elimination of joint engineering.[27]

12. Most of the commenting parties argue that the joint engineering process that is used to determine the appropriate LBO setting is burdensome for carriers and manufacturers and is a source of confusion for customers. For example, the local exchange carriers (LECs) contend that joint engineering involves substantial expense and results in service delays and inefficiencies for customers using the DS1 service.[28] NYNEX concurs with Verilink's view that the proposed rule amendment would facilitate implementation of the ANSI DS1 interface standard which, in turn, would eliminate the need for joint engineering.[29] The equipment manufacturers filing comments, other than IDCMA, corroborate Verilink's contention that joint engineering is burdensome, expensive and creates confusion for DS1 customers.[30] TIA, an association of manufacturers of telecommunications products, states that the confusion associated with the joint engineering process discourages the use of DS1 services by small businesses.[31]

13. A number of parties contend that the current rules accord consumers too much autonomy in adjusting the LBO functionality setting on their NCTE and that the resulting LBO misadjustments harm the network. For example, TIA states that customers who misadjust the LBO setting may impair the quality of service to other users by inadvertently launching excessive signals into the network.[32] USTA argues that the current rules are deficient in that they do not offer customers a choice between attending to the LBO functionality setting themselves and procuring LBO functionality in the network from the serving carrier. According to USTA, there are customers who would prefer not to be responsible for adjusting their own LBO setting.[33]

14. Various parties maintain that the proposed rule amendment would not result in

[24] Petition at 18-19.

[25] Id. at 12-13, 16.

[26] Id. at 14.

[27] Id. at 11.

[28] Comments of Ameritech at 2, Bell Atlantic at 2, BellSouth at 3, NYNEX at 2, Pacific Bell at 2, Southwestern Bell at 4, GTE at 3-4. Reply comments of USTA at 3.

[29] Comments of NYNEX at 2.

[30] Comments of INC, Larus, and PairGain. Reply Comments of INC and TIA.

[31] Reply Comments of TIA at 2.

[32] Id. at 2-3.

[33] Reply Comments of USTA at 2.

additional costs to DS1 consumers.[34] For example, Southwestern Bell and Larus, a manufacturer of network interface devices, T1 transmission equipment, and T1 interface modules used by CSU vendors, state that LBO functionality is already present in network interface devices used by carriers that perform the loopback function. Thus, these parties contend that the proposed amendment would not increase DS1 service costs to consumers since the same functionality currently used by carriers to perform loopback testing could be used to provide LBO.[35] While anticipating that prices of CPE may decline, Bell Atlantic states that the cost involved to reinstall the LBO function for carriers that have disabled or removed that function may offset the anticipated administrative savings that may be expected to accrue from the elimination of the joint engineering process.[36] INC, a manufacturer of digital network products, argues that the current provision of LBO functionality in CPE is redundant and wasteful, particularly when service is delivered through multiplexers. As the use of fiber optic media increases, INC asserts that LBO functionality provided in CPE will add unnecessary functionality and cost to the consumer since LBO attenuation is not required where DS1 service is delivered over fiber optics and derived through network multiplexing.[37] PairGain, a manufacturer of loop transmission equipment agrees that carrier provided LBO would not increase the cost of CPE or otherwise adversely affect end users.[38]

15. A number of commenters contend that competition in the CPE market would not be adversely affected by the proposed rule change.[39] Pacific Bell states that carrier provision of LBO functionality will not effect the competitive provision of NCTE because the LBO function represents only a small part of the electronics in NCTE and that customers would still require NCTE to perform other functions.[40] Bell Atlantic concurs with this position, noting that customers would still have to obtain unregulated NCTE to terminate their DS1 services.[41] USTA states that the proposed rule change would not adversely impact competition because the functionality itself does not significantly affect CPE cost or the ability of CPE vendors to sell related equipment.[42] PairGain agrees that carrier provided LBO would not adversely affect competition in the CPE market.[43]

16. IDCMA, an association of manufacturers of data communications equipment, including NCTE, and the Utilities Telecommunications Council (UTC), representing the telecommunications interests of the nation's electric, gas, water and steam utilities, oppose the Petition.[44] IDCMA and UTC argue that the benefits of competitively provided CPE would be jeopardized by the migration of LBO functionality to the network.[45] IDCMA further charges that

[34] *See, e.g.*, Comments of BellSouth at 6 (implementation of ANSI DS1 standard as proposed by Verilink would not result in additional costs to DS1 consumers), Southwestern Bell at 6, Larus at 1-2.

[35] Comments of Southwestern Bell at 6, Larus at 1-2.

[36] Comments of Bell Atlantic at 3.

[37] Comments of INC at 7-8.

[38] Comments of PairGain at 1.

[39] Comments of Ameritech at 2, Bell Atlantic at 2, BellSouth at 6, NYNEX at 2, and PairGain at 1. Reply Comments of USTA at 4.

[40] Reply Comments of Pacific Bell at 2-3.

[41] Comments of Bell Atlantic at 2.

[42] Reply Comments of USTA at 4.

[43] Comments of PairGain at 1.

[44] Opposition of the Independent Data Communications Manufacturers Association (IDCMA Opposition); UTC *ex parte* letter dated May 5, 1993 (UTC *ex parte* letter).

[45] IDCMA Opposition at 7; UTC *ex parte* letter.

Verilink misconceives the Commission's principal policymaking role by proposing that the Commission's rules should be designed in conformance with the ANSI DS1 industry standard rather than vice versa.[46] IDCMA contends that Verilink overstates the problems associated with joint engineering and fails to mention that carriers have an obligation under the Commission's rules to specify the output signal power at the time of installation.[47] According to IDCMA, "[a]ny failure by the carriers to provide such information should not form the basis for migrating such functionalities from competitively supplied equipment to monopoly services."[48] IDCMA asserts that Verilink's claims of customer confusion are exaggerated particularly in light of the fact that some manufacturers are offering NCTE with LBO capability that automatically sets itself at the optimal LBO level, thus eliminating the need for joint engineering.[49] IDCMA also argues that the expected cost savings in the prices of CSU if the LBO function were removed would be less than the $3-7 per unit price savings estimated by Verilink and would not produce a decline in DS1 service costs but would merely shift costs to the network side.[50]

17. In a recent *ex parte* meeting, Verilink indicated that, notwithstanding various developments that have transpired in the industry since the filing of the present Petition, the public interest concerns expressed in its Petition have not diminished.[51] Verilink stated that, despite having adopted certain provisional measures that have helped to alleviate problems associated with the joint engineering process, it believes that there is nevertheless a continuing need for a uniform interface standard as proposed in its Petition.[52]

18. Also in a recent *ex parte* meeting, IDCMA stated its continued opposition to the migration of LBO functionality to the regulated network.[53] IDCMA noted that various CPE manufacturers produce "Intelligent CSUs" which provide a wide range of functionality, including LBO. To the extent that LBO functionality in CPE is rendered superfluous, IDCMA anticipates that demand for these more specialized "Intelligent CSUs" would decline. This fact, it argues, refutes Verilink's claim that the proposed rules change would not adversely impact competition in the CPE market.[54]

## IV. DISCUSSION

19. We conclude that LBO functionality should not be re-bundled with the regulated transmission services of local exchange carriers and, for the reasons set forth below, we deny Verilink's Petition. Before the unbundling and detariffing of NCTE, when telephone companies provided both the terminal equipment and the associated transmission service on a regulated basis, the signal attenuation function was performed by the local telephone company. With the unbundling of NCTE, there was still a need to avoid cross talk caused by increased signal levels, which was considered a "harm" to the network.[55] Insofar as signal level functionality was already part of NCTE, the Commission concluded that LBO should remain a CPE feature and the telephone company should instruct the NCTE installer on the appropriate signal

[46] IDCMA Opposition at 11.

[47] Id. at 7.

[48] Id.

[49] Id. at 8.

[50] Id.

[51] Verilink *ex parte* presentation, July 18, 1995.

[52] Id.

[53] IDCMA *ex parte* presentation, July 12, 1995.

[54] IDCMA *ex parte* letter dated July 13, 1995.

[55] *See* 47 C.F.R. Section 68.3(g).

level option prior to service commencement.[56] The Commission found no compelling need to move LBO functionality to the network. Indeed, in deciding to create the three signal attenuation settings for LBO on NCTE, the Commission specifically noted that:

> The BOCs have proposed rules that will ensure that registered terminal equipment for connection to [DS1 facilities] will not exceed acceptable signal power limitations. These rules will be sufficient to protect against the possibility of excessive signal voltages without imposing additional administrative requirements on consumers.[57]

Thus, the Commission clearly considered the issues posed in the Petition, and decided that registered NCTE should continue to provide the attenuation function previously provided by network NCTE.[58] LBO became an adjunct equipment function that CPE manufacturers were required to offer customers.

20. Subject to the single exception for loopback testing, the Commission's unbundling policy remains in force today. In *Computer Inquiry III*, the Commission specifically concluded that only loopback testing merited a special exception from the general treatment of NCTE as CPE.[59] The Commission made clear in that proceeding its intention to define exceptions to CPE treatment of NCTE functionalities under "carefully delimited conditions to prevent carriers from encroaching on the flourishing competitive market for CPE."[60] In the most recent *NYNEX Enterprise* decision, the Commission cited to improvements in data communications equipment quality, lower CPE prices, improved performance of users' data communications networks, and job creation in various sectors of the economy as indicia of the success of its unbundling policy.[61] These decisions demonstrate the Commission's longstanding commitment to the policy of unbundling and to the benefits produced by that policy. Thus, any proponent seeking to modify this policy bears a heavy burden to justify the necessity for such modification. We believe that Verilink has not met that burden.[62]

21. In the present proceeding, Verilink and a number of commenters argued that a proposed rule amendment to adopt a uniform LBO output level would facilitate the implementation of the ANSI DS1 standard that was in place at the time that Verilink filed its Petition.[63] Verilink promoted the adoption of its proposed rule change as a means of harmonizing the Commission's Part 68 rules with

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[56] *Interconnection Order II*, 49 Fed. Reg. at 48715.

[57] Id. at 48716.

[58] Id. at 48720.

[59] *Computer Inquiry III Phase II Order*, 2 FCC Rcd at 3105 ("while additional NCTE functions were proposed by various parties as appropriate for carrier provision on a regulated basis, the case for each is less convincing than that for remote loopback testing").

[60] *Computer Inquiry III Phase II Reconsideration*, 3 FCC Rcd at 1167.

[61] *NYNEX Enterprise*, 9 FCC Rcd at 1608.

[62] IDCMA argues that, in addition to requiring an amendment of the Commission's Part 68 rules, the relief that Verilink seeks also would require modification or a waiver of the Commission's so-called "bundling" rule. IDCMA Opposition at 9. Section 64.702(e), known both as the "bundling" and the "anti-bundling" rule, prohibits bundling of CPE with regulated (tariffed) transmission service. *See NYNEX Enterprise*, 9 FCC Rcd 1608, n.8. Because we are denying the instant Petition, we do not pass on the question of whether a modification or waiver of Section 64.702(e) would be required.

[63] Reply Comments of Verilink at 11.

the then-current industry standard.[64] During the pendency of the present Petition, however, the industry standard that provided the impetus for the present Petition has been revised to reflect the three LBO output levels set forth in the Commission's current rules. Thus, the incongruity between the Commission's rules and the prevailing industry standard has been remedied by the recently approved ANSI DS1 standard, which is wholly consistent with the Commission's rules.

22. Much of Verilink's argument hinges on its contention that joint engineering, the process by which the telephone company and DS1 customer determine the appropriate LBO output level for that customer's network, is burdensome and a source of confusion for consumers.[65] A Commission inquiry, however, has revealed that technical modifications made by manufacturers and telephone companies over recent years have reduced or, in some cases, eliminated the likelihood of misadjusted LBO signal levels and, therefore, have largely rectified the confusion and other problems formerly associated with the joint engineering process. The combination of these manufacturer and carrier modifications coupled with the apparent availability of certain CSUs that can operate automatically at the optimal LBO level[66] tends to diminish the strength of Verilink's argument that the rule amendments are justified by problems associated with joint engineering.

23. In addition, to the extent that manufacturers and carriers have implemented technical modifications designed to reduce the likelihood of misadjusted LBO signal levels, it would follow that incidents of harm to the network allegedly caused by customer misadjustments would similarly decline. Moreover, the fact that the Commission has received no complaints, either formal or informal, of network harm resulting from misadjusted LBO levels bolsters our conclusion that any continuing harm to the network is negligible.

24. Finally, Verilink and a number of commenters claim that the proposed migration of LBO functionality to the carrier's network would not increase costs for DS1 consumers (and may reduce costs) or adversely impact competition in the CPE market.[67] Verilink reaches the conclusion that consumer prices would not increase, however, based on a now questionable assumption that LBO functionality is already present in network interface devices used by carriers to perform the loopback function.[68] As stated by Bell Atlantic,

> The LBO function was previously incorporated in the network interface devices that provide loopback testing, but the LBO function was not used. Since the Commission's [*BellSouth*] decision denying a declaratory ruling request that would have allowed the function to be activated, the function has been disabled or removed. The cost of re-installing the LBO function will likely offset any administrative savings. The principal customer benefit would be in eliminating the time and trouble to determine the proper LBO setting on the CPE.[69]

We anticipate that, with the passage of time since the Bureau's 1991 decision in the *BellSouth Order*, more carriers would have disabled or removed the LBO function that was previously installed in

[64] Id. at 15.

[65] Petition at 8.

[66] IDCMA Opposition at 8.

[67] *See* Paragraphs 14 and 15 above.

[68] *See* Petition at 11; Paragraph 14 above.

[69] Comments of Bell Atlantic at 3 (footnote omitted).

network interface devices that perform loopback testing. Accordingly, we question whether carriers, assuming they are even inclined to re-install the LBO function, could do so today without increasing DS1 service costs.

25. Verilink's argument that the proposed rule amendments would not weaken competition in the CPE market is similarly unavailing. As argued by IDCMA, to the extent that re-bundling would render LBO functionality in CPE redundant or inoperable, demand for products capable of performing this function could be expected to decrease.[70] We are persuaded that the benefits of competitively provided LBO, including such product innovations as the automatic LBO capability[71] and "Intelligent CSUs," would be jeopardized by the proposed migration of the LBO function to the carrier's network.

## V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i) and 201 - 205 of the Communications Act, 47 U.S.C. §§ 154(i), 201-205, and Sections 0.91, 0.291, and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291 and 1.3 the Petition for Rulemaking filed by Verilink IS DENIED.

**FEDERAL COMMUNICATIONS COMMISSION**

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

[70] IDCMA *ex parte* letter, dated July 13, 1995.

[71] IDCMA Opposition at 8.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

## PUBLIC NOTICE

Released: August 16, 1995

## FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC record.

The decisions are placed in general docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

**Abiquiu Village TV Association** - Requests for Waiver of Regulatory Fees - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 16, released June 22, 1995].

**AT&T Corporation** - Request for Refund of Fee for Application to Launch & Operate Emergency Replacement Satellite - **Granted** (July 11, 1995).

**Bowling Green Broadcasters, Inc.** - Petition to Waive Regulatory Fee
- **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 15, released 15, 1995].

**Cape Television, Inc.** - Request for Waiver of Regulatory Fees - **Granted** (July 5, 1995). [See Fee Notice 95-257, Para. 15, released June 22, 1995].

**Chronicle Publishing Company** - Request for Reduction of Regulatory Fees - **Granted** (July 18, 1995). [See FCC Notice 95-257, Para. 18-20, released June 22, 1995].

**Concord Area Broadcasting** - Request for Waiver of Regulatory Fee - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 15, released June 22, 1995].

**Creede TV Association** - Request for Waiver of Regulatory Fees - **Granted** (July 5, 1995). [See FCC Notice 95-257, released June 22, 1995].

**Duhamel Broadcasting Enterprises** - Petition for Waiver or Remission of Regulatory Fees - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 18-20, released June 22, 1995].

**Edgemont TV Booster Club** - Request for Waiver of Regulatory Fees - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 16, released June 22, 1995].

**Elk Bend TV Association** - Exemption from payment of Regulatory Fees - **Granted** (July 14, 1995). [See FCC Notice 95-257, Para. 16, released June 15, 1995].

**Heritage Broadcasting Company of Michigan** - Request for reduction of Regulatory Fees - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 18-20, released June 22, 1995].

**KBS License L.P.** - Petition for Waiver or Remission of Regulatory Fees - **Granted** (July 14, 1995). [See FCC Notice 95-257, Para. 18-20, released June 22, 1995].

**KXAN, Inc.** - Request for Reduction in Regulatory Fees - **Granted** (July 17, 1995). [See FCC Notice 95-257, Para. 18-20, released June 22, 1995].

**Lake County TV-FM, Inc.** - Request for Waiver of Regulatory Fees - **Granted** (July 5, 1995). [See FCC Notice 95-257, released June 22, 1995].

**Lynchburg Independent Broadcasters, Inc.** - Petition to Waive Regulatory Fee - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 15, released June 15, 1995].

**Midwest Television, Inc.** - Request for Reduction of Regulatory Fees - **Granted** (July 18, 1995). [See FCC Notice 95-257, Para. 18-20, released June 22, 1995].

**Mountain Broadcasting Company, Inc.** - Request for Waiver of Regulatory Fee - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 15, released June 22, 1995].

**New England Television, Inc.** - Petition for Waiver of Regulatory Fee - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 15, released June 22, 1995.

**Radio Station KNGS(FM)** - Request for Waiver of Regulatory Fee - **Denied** (July 18, 1995). {See FCC Notice 95-257, released June 22, 1995].

**Stauffer Communications, Inc.** - Request for Reduction of Regulatory Fees - **Granted** (July 18, 1995). [See FCC Notice 95-257, Para. 18-20, release June 22, 1995].

**Vail Broadcasting Systems, Inc.** - Petition for Waiver of Regulatory Fee - **Granted** (July 18, 1995). [See FCC Notice 95-257, Para. 14, released June 22, 1995].

**Western States Broadcasting, Inc.** - Request for Waiver of Regulatory Fees - **Granted** (July 5, 1995). [See FCC Notice 95-257, Para. 15, released June 22, 1995].

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)418-1995.

**FEDERAL COMMUNICATIONS COMMISSION**

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

Ms. Alice Garcia
Treasurer
Abiquiu Village TV Association
P.O. Box 63
Abiquiu, New Mexico 87510

Re: Requests for Waivers of Regulatory Fees

Fee Control: #9408038835184013
Fee Paid: $135

Fee Control: #9408028835125007
Fee Paid: $135

Dear Ms. Garcia:

This is in response to your request for a waiver of the annual regulatory fees for the television translator system operated by Abiquiu Village TV Association of Abiquiu, New Mexico.

You maintain that Abiquiu Village TV serves a small community of 100 households in rural New Mexico, and that the system serves a population base too small to pay for the regulatory fees as well as for the repairs and maintenance of the translator system. You have sought to have the licensees of the stations, whose signals you retransmit, pay the fees, and have requested that the Commission waive the portion of those fees not paid by the licensees.

In implementing the regulatory fee program, the Commission stated that it would waive its regulatory fees for any translator station that:

> (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support.

Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 16 released June 22,1995. The Commission further held, however, that the burden will remain on the translator licensees to document and substantiate their eligibility for the waiver.

It appears that Abiquiu Village TV's translator stations are not licensed to, and do not have common ownership with, any commercial broadcast stations, that they do not sell advertising, and that their sole source of income is derived from the voluntary donations of families in the community served by the translators. Under these circumstances, Abiquiu Village TV's annual regulatory fees for FY 1994 are waived.

Checks, made payable to the makers of the original checks, refunding the regulatory fees already paid, will be sent to you at the earliest practicable time. If you have any questions concerning the refunds, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Stephen L. Goodman, Esquire
Halprin, Temple and Goodman
1100 New York Avenue, N.W.
Suite 650 East
Washington, D.C. 20005

AT&T Corp.
Request for refund of fee for
application to launch and
operate emergency replacement
satellite
Fee Control #: 9506148160425001

Dear Mr. Goodman:

This is in response to your request for waiver and refund of the fee submitted by AT&T Corp. (AT&T) in connection with its application to launch and operate a satellite.

You state that AT&T filed the application and fee payment in the amount of $80,360 in order to obtain the necessary authorization to construct and operate a satellite to replace an earlier authorized satellite that was lost shortly after launch.

You contend that the waiver is justified because, as a request for emergency replacement of an authorized satellite, the Commission will incur little or no costs in processing the application. You state that AT&T received construction authority for its replacement satellite at the time that the Commission authorized the construction of the lost satellite. Moreover, you state that, because the replacement satellite is operationally identical to the satellite AT&T initially launched, the technical analysis, interference coordination, and international advance notification activities that were associated with that satellite will not have to be repeated.

We are aware that the fees submitted by AT&T to cover its application for its replacement satellite are substantial, and that Congress has granted the Commission narrow authority to waive or reduce each fee contained in the schedule of fees governing applications and other filings. Further, we note that each fee contained in the fee schedule represents a congressional judgment on the appropriate fee for the particular matter in question. As such, there will frequently be individual cases where the cost burden on the Commission's processes will be more or less than the required fee. For example, it is not unusual that an applicant withdraws before substantive processing of its application begins. In these circumstances, the Commission, except in the most compelling circumstances, retains the fee payment in its entirety.

In the case of AT&T, we recognize that the fees contained in the fee schedule bear scant relationship to the resources required to process the replacement satellite's authorizations because much of the processing is insignificantly different from that required for AT&T's initial satellite. However, the Commission will incur costs in the processing of AT&T's application to launch and operate its replacement satellite.

In a similar instance, where Hughes Communications Galaxy, Inc. (Hughes) requested a reduction in the fees for the construction, launch and operation of a satellite to replace a satellite destroyed during launch, its fees were reduced to $5,000, the fee then applicable to an application to modify a space station authorization. See letter to James F. Rogers from Marilyn J. McDermett, Associate Managing Director, dated April 11, 1994. The fee for such a modification is currently $5,740. Since AT&T already possesses construction authority for its replacement satellite, we will adjust AT&T's fee to $5,000 rather than $5,740 required with an application to modify a space station authorization.

Accordingly, for good cause shown, your request is granted to the extent specifically indicated above. We will assess AT&T a fee of $5,000 to cover its application for authority to launch and operate its replacement satellite. Therefore, AT&T is entitled to a refund of $75,360. A check, made payable to the maker of the original check and drawn in the amount of $75,360, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

Jeffrey W. Malickson, Esquire
P.O. Box 32488
Charlotte, N.C. 28232

Re: Bowling Green Broadcasters, Inc.
Petition to Waive Regulatory Fee

Dear Mr. Malickson:

This is in response to the petition for waiver of the Fiscal Year 1994 regulatory fee that you filed on behalf of Radio Station WLBJ(AM), Bowling Green, Kentucky, licensed to Bowling Green Broadcasters, Inc.

You state that WLBJ(AM) has been dark since December 6, 1991 and that it has generated no revenue during that time.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15 (June 15, 1995), the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would therefore, waive the fee requirement for stations which have ceased operation.

Accordingly, your petition is granted and the FY 1994 regulatory fee for Bowling Green Broadcasters, Inc. is waived. The waiver shall remain in effect until Radio Station WLBJ(AM) is reactivated.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Robert A. Woods, Esquire
Schwartz, Woods & Miller
Suit 300
The Dupont Circle Building
1350 Connecticut Ave., N.W.
Washington, D.C. 20036-1702

Re: Cape Television, Inc.
Request for Waiver of Regulatory Fees

Dear Mr. Woods:

This is in response to the petition for waiver of the Fiscal Year 1994 regulatory fee that you filed on behalf of Cape Television, Inc., licensee of station WCVX(TV), Vineyard Haven, Massachusetts, and associated auxiliary broadcast and low-power television stations.

You maintain that the stations licensed to Cape Television are silent and have been out of service since before the licenses were assigned to Cape Television in September 1992, and that because of its financial difficulties Cape has been unable to resume operation. Applications for authority to assign Cape Television's licenses to Boston University Communications, Inc., were granted on September 28, 1994.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15, released June 22, 1995, the Commission determined that it would waive the fee requirement for stations which are dark. WCVX(TV) and its associated auxiliary broadcast and low-power stations have been dark during FY 1994, and Cape Television has now assigned its licenses. Thus, the Commission will waive Cape Television's regulatory fees.

If you have any questions concerning the regulatory fees, please call the Chief, Fee Section at (202) 418-1955.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 1 8 1995

Alane C. Weixel, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566

Re: Request for Reduction in Regulatory Fees
Chronicle Publishing Company
Fee Control: # 9408198835012001
Fee Paid: $24,000

Dear Ms. Weixel:

This is in response to the request filed on behalf of Chronicle Publishing Company for a waiver of the Mass Media regulatory fees assessed for VHF Satellite Television Stations KUPK-TV, Garden City, Kansas, and KLBY(TV), Colby, Kansas.

KUPK-TV and KLBY(TV) are satellites for VHF Television Station KAKE-TV, Wichita, Kansas. KAKE-TV and its satellite stations are all located in the Wichita, Kansas, market, which is the country's 62nd largest market. Chronicle maintains that its satellite stations serve small rural communities and that it is inequitable to assess the satellite stations with the same regulatory fee as a full service station. Chronicle argues that it should not be required to pay a higher regulatory fee than other stations serving similarly ranked ADI markets, and it requests that the fees for satellite stations KUPK-TV and KLBY(TV) be waived. Chronicle has paid an aggregate of $24,000 in regulatory fees for its full service and satellite television stations.

In establishing the Schedule of Fees for FY 1994, Congress did not distinguish between the fees assessed against fully operational television stations and television satellite stations. 47 U.S.C. § 159. However, in Implementation of Section 9 of the Communications Act, FCC 95-257, ¶¶ 18-20 released June 22, 1995, the Commission concluded that the assessment of regulatory fees would be particularly inequitable to licensees of full service stations which were also operating satellite stations serving rural and sparsely populated areas. The Commission, therefore, determined that for FY 1994, where licensees operating satellite stations have timely filed petitions for relief, waiver or reduction of the regulatory fees would be appropriate so that each set of parent and satellite stations will pay a regulatory fee based upon the total number of television households served. Thus, for FY 1994, licensees with

satellite stations will be assessed a single regulatory fee comparable to the fee assessed stations serving markets with the same number of television households. FCC 95-257 at ¶ 20. Similar reductions, however, are not contemplated for FY 1995 because in Assessment and Collection of Regulatory Fees for Fiscal Year 1995, FCC 95-227, released June 19, 1995, the Commission adopted a reduced fee for satellite stations.

In our review of the Television and Cable Fact Book, Vol. 62, A-499, A-503 and A-513 (1994), it appears that the combined service areas for VHF Television Station KAKE-TV and Satellite Television Stations KUPK-TV and KLBY(TV) encompasses 488,200 television households. The total number of television households served is the equivalent of a station serving a market in the 51st - 100th market category. Thus, Chronicle will be assessed a single fee comparable to that of a VHF station in the 51st - 100th market category, or $8,000.

Chronicle has already paid $24,000 of its regulatory fees for full service and satellite stations. Thus, it is entitled to a refund of $16,000. A check, made payable to the maker of the original check in the amount of $16,000, will be sent to you at the earliest practicable time.

If you have any questions concerning the refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

Joseph Buerry
President
Concord Area Broadcasting
5552 Pamplona Ct.
Concord, CA 94521

Re: Request for Waiver of Annual Regulatory Fee

Dear Mr. Buerry:

This is in response to the request for waiver of the Fiscal Year 1994 regulatory fee that you filed on behalf of Radio Station KKIS, Concord, California, licensed to Concord Area Broadcasting.

You maintain that payment of the fee would present a hardship because KKIS is off the air and has no income.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15, released June 22, 1995, the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would therefore, waive the fee requirement for stations which have ceased operation.

Accordingly, your request is granted and the FY 1994 regulatory fee for Concord Area Broadcasting is waived. The waiver shall remain in effect until Radio Station KKIS is reactivated.

If you have any questions about the regulatory fees, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. Ed Hargraves
Chairman
Creede TV Association
Box 129
Creede, CO 81130

Re: Request for Waiver of Regulatory Fees

Dear Mr. Hargraves:

This is in response to your request seeking relief from the regulatory fees for the above referenced television translator stations licensed to Creede TV Association (Creede).

You maintain that Creede operates as part of Creede Activities, Inc., a non-profit corporation under the laws of the State of Colorado. You submitted a copy of Creede's certification from the State of Colorado reflecting its registration as a non-profit corporation.

In establishing the regulatory fee program, Congress provided an exemption from the fee requirement for nonprofit entities. 47 U.S.C. § 159(h). In Implementation of Section 9 of the Communications Act, FCC 95-257, released June 22, 1995, the Commission amended Section 1.1162(c) of its Rules, 47 C.F.R. § 1.1162(c), to exempt from regulatory fees:

> . . . an entity with current certification as a nonprofit corporation or other nonprofit entity by a state or other governmental authority.

Thus, as a non-profit corporation, registered with the State of Colorado, Creede TV Associates qualifies as a non-profit licensee under Section 9(h) of the Communications Act and Section 1.1162(c)of the Commission's Rules, and is therefore exempt from the Commission's regulatory fee requirements.

A copy of this letter should be included in any future correspondence with respect to imposition of the regulatory fees. If you have any question about the exemption, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

8935

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

Grover C. Cooper, Esquire
Fisher, Wayland, Cooper, Leader
& Zaragoza, L.L.P.
2001 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20006

Re: Petition for Waiver or Remission of
Regulatory Fees
Duhamel Broadcasting Enterprises
Fee Control: #9409098835432001
Fee Paid: $20,000

Dear Mr. Cooper:

This is in response to the Petition filed on behalf of Duhamel Broadcasting Enterprises, Inc., requesting a reduction in the Mass Media regulatory fees assessed for VHF Satellite Stations KHSD-TV, Lead, South Dakota, KSGW-TV, Sheridan, Wyoming, and KDUH-TV, Scottsbluff, South Dakota.

Those stations are satellites for UHF Television Station KOTA-TV, Rapid City, South Dakota. KOTA-TV and each of its satellites are located in the remaining markets, which are markets with smaller populations than the top 100 markets. Duhamel was assessed and paid its fees of $5,000 or ($20,000) for KOTA-TV and each of its satellite stations for Fiscal Year 1994 (FY 1994). The aggregate fee of $20,000 is greater then the fee which would have been paid by a VHF television station located in a top 10 market. You urge the Commission to reconsider its fee structure for satellite licensees, such as Duhamel, which serve sparsely populated areas.

In establishing the Schedule of Fees for FY 1994, Congress did not distinguish between the fees assessed against fully operational television stations and television satellite stations. 47 U.S.C. § 159. However, in Implementation of Section 9 of the Communications Act, FCC 95-257, ¶¶ 18-20 released June 22, 1995, the Commission concluded that the assessment of regulatory fees would be particularly inequitable to licensees of full service stations which were also operating satellite stations serving rural and sparsely populated areas. The Commission therefore determined that for FY 1994, where licensees operating satellite stations have timely filed petitions for relief, waiver or reduction of the regulatory fees would be appropriate so that each set of parent and satellite stations will pay a regulatory fee based upon the total number of television households served. Thus, for FY 1994, licensees with

satellite stations will be assessed a single regulatory fee comparable to the fee assessed stations serving markets with the same number of television households. FCC 95-257 at ¶ 20. Similar reductions, however, are not contemplated for FY 1995 because in Assessment and Collection of Regulatory Fee for Fiscal Year 1995, FCC 95-227, released June 19, 1995, the Commission adopted a reduced fee for satellite stations.

In our review of the Television and Cable Fact Book, Vol. 62, A-743, A-1044, A-1049 and A-1304 (1994), it appears that the combined service areas for Television Station KOTA-TV and Satellite Television Stations KHSD-TV, KSGW-TV and KDUH-TV encompasses 171,200 TV households. The total number of TV households served is the equivalent of a station serving a non-top 100 or remaining market. Thus, Duhamel will be assessed a single fee comparable to that of a VHF station in the remaining market category, or $5,000.

Duhamel has already paid $20,000 of its regulatory fees for full service and satellite stations. Thus, it is entitled to a refund of $15,000. A check, made payable to the maker of the original check in the amount $15,000, will be sent to you at the earliest practicable time.

If you have any questions concerning the refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

Edgemont TV Booster Club
Box 707
Edgemont, S.D. 57735

Re: Request for Waiver of Regulatory Fees

Dear Sir:

This is in response to your request for an exemption from the regulatory fee for the television translator station system licensed to the Edgemont TV Booster Club (Edgemont TV).

You state that Edgemont TV provides the only broadcast television service to Edgemont S. D. and the surrounding area. You maintain that the translator is supported by donations through the letters to the editor column in the local newspaper and that all expenses for the translator, except for electricity which is paid by the Town of Edgemont, are raised through donations from the community.

In implementing the regulatory fee program, the Commission stated that it would waive its regulatory fees for any translator station that:

> (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support.

Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 16 released June 22, 1995. The Commission further held, however, that the burden will remain on the translator licensees to document and substantiate their eligibility for the waiver.

It appears that Edgemont TV's translator system is not licensed to, and does not have common ownership with, any commercial broadcast stations, that it does not sell advertising, and that its sole source of income is derived from the voluntary donations of families in the communities served by the translator system. Under these circumstances, Edgemont TV's regulatory fees for FY 1994 are waived.

If you have any questions concerning the regulatory fee, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 1 ...

Ms. Marian A. Evelith
Secretary
Elk Bend TV Association
HC 61 Box 72
Salmon, ID 83467

Re: FY 1994 Regulatory Fees
Fee Control # 9408088835815015
Fee Paid: $135

Dear Ms. Evelith:

This is in response to your request for assessment and an exemption from the FY 1994 regulatory fee for the Elk Bend TV Association. You maintain that Elk Bend is a non profit organization serving a very small isolated community, and that it has limited operating funds.

In implementing the regulatory fee program, the Commission indicated that it would waive the regulatory fees for any translator station that:

> (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support.

Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 16 (June 15, 1995). The Commission further held, however, that the burden will remain on the translator licensees to document and substantiate their eligibility for the waiver.

Your letter does not indicate that Elk Bend's translator operation falls specifically within the Commission's policy. However, your representations that Elk Bend serves a small isolated community, is non profit, and has limited funds, establishes that Elk Bend is the type of translator operation for which the Commission proposed to grant relief from the regulatory fee obligation. Thus, the Commission will waive the regulatory fee for Elk Bend TV Association for FY 1994.

A check, made payable to the maker of the original check in the amount of $135, will be sent to you at the earliest practicable time. If you have any questions concerning this the regulatory fees, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

Mr. William E. Kring
Station Manager - WWTV
Heritage Broadcasting Company of Michigan
P.O. Box 627
Cadillac, Michigan 49601

Re: Heritage Broadcasting Company
Television Station WWTV, Cadillac, MI
Fee Control #9408058835242003
Fee Paid: $5,000

Satellite Station WWUP-TV, Sault Ste. Marie, MI
Fee Control #9408038835153010
Fee Paid: $5,000

Dear Mr. Kring:

This is in response to your letter requesting a reduction in the Mass Media regulatory fee assessed for VHF Satellite Station WWUP-TV, Sault Ste. Marie, Michigan.

Cadillac and Sault Ste. Marie are located in the Cadillac-Traverse City market, which is within the 121st largest market. Heritage has been assessed a fee of $5,000 for each of the referenced stations for Fiscal year 1994 (FY 1994). You maintain that the combined fee of $10,000 is comparable to the fees paid by VHF television stations in larger markets, and that the Commission should reconsider its fee structure for satellite licensees, such as WWUP-TV, which serve smaller markets.

In establishing the Schedule of Fees for FY 1994, Congress did not distinguish between the fees assessed against fully operational television stations and television satellite stations. 47 U.S.C. § 159. However, in Implementation of Section 9 of the Communications Act, FCC 95-257, ¶¶ 18-20 (June 15, 1995), the Commission concluded that the assessment of regulatory fees would be particularly inequitable to licensees of full service stations which are also operating satellite stations serving rural and sparsely populated areas. The Commission therefore determined that for FY 1994, where licensees operating satellite stations have timely filed petitions for relief, waiver or reduction of the regulatory fees would be appropriate so that each set of parent and satellite stations will pay a regulatory fee based upon the total number of television households served. Thus, for FY 1994, licensees with satellite stations will be assessed a single regulatory fee comparable to the fee assessed stations serving markets with the same number of television

households. FCC 95-257 at ¶ 20. Similar reductions, however, are not contemplated for FY 1995 because in Assessment and Collection of Regulatory Fee for Fiscal Year 1995, FCC 95-227 (June 14, 1995) the Commission adopted a reduced fee for satellite stations.

In our review of the Television and Cable Fact Book, Vol. 62, A-630 and A-630 (1994), it appears that the combined service areas for Television Station WWTV and Satellite Television Station WWUP-TV encompasses 395,400 TV households. The total number of TV households served is the equivalent of a station serving the top 51-100 markets. Thus, Heritage will be assessed a single fee comparable to that of a VHF station in the 51-100 market category, or $8,000.

Heritage Broadcasting Company of Michigan has already paid $10,000 of regulatory fees for its full service and satellite stations. Thus, it is entitled to a refund of $2,000. A check, made payable to the maker of the original check in the amount $2,000, will be sent to you at the earliest practicable time.

If you have any questions concerning the refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Michelle M. Shanahan, Esquire
Hogan & Hartson L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

Re: Petition for Waiver or Remission of
Regulatory Fees
KBS License L.P.
Fee Control #9408038835153008
Fee Paid: $32,000

Dear Ms. Shanahan:

This is in response to the Petition filed on behalf of KBS License L.P., requesting a waiver or reduction in the Mass Media regulatory fees assessed for VHF Satellite Stations KBSD-TV, Ensign, Kansas, KBSH-TV, Hays, Kansas, and KBSL-TV, Goodland, Kansas.

Those stations are satellites for VHF Television Station KWCH-TV, Wichita-Hutchinson, Kansas. KWCH-TV and each of its satellites are located in the Wichita-Hutchinson, Kansas, market, which is the 62nd largest market. You maintain that KWCH-TV and its satellites, collectively serve communities with 203,400 television households. Broadcasting and Cable Yearbook, C-198 and C-214 (1993). KBS was assessed and paid its fees of $8,000 (or an aggregate of $32,000) for KWCH-TV and each of its satellite stations for Fiscal Year 1994 (FY 1994). The aggregate fee of $32,000 is greater than the fee which would have been paid by a VHF television station located in the New York City market, the country's largest television market. You urge the Commission to waive or substantially reduce the fee for KBS's satellite stations.

In establishing the Schedule of Fees for FY 1994, Congress did not distinguish between the fees assessed against fully operational television stations and television satellite stations. 47 U.S.C. § 159. However, in Implementation of Section 9 of the Communications Act, FCC 95-257, ¶¶ 18-20 released June 22, 1995, the Commission concluded that the assessment of regulatory fees would be particularly inequitable to licensees of full service stations which were also operating satellite stations serving rural and sparsely populated areas. The Commission, therefore, determined that for FY 1994, where licensees operating satellite stations have timely filed petitions for relief, waiver or reduction of the regulatory fees

would be appropriate so that each set of parent and satellite stations will pay a regulatory fee based upon the total number of television households served. Thus, for FY 1994, licensees with satellite stations will be assessed a single regulatory fee comparable to the fee assessed stations serving markets with the same number of television households. FCC 95-257 at ¶ 20. Similar reductions, however, are not contemplated for FY 1995 because in Assessment and Collection of Regulatory Fees for Fiscal Year 1995, FCC 95-227, released June 19, 1995, the Commission adopted a reduced fee for satellite stations.

In our review of the Television and Cable Fact Book, Vol. 62, A-500, A-504, A-506 and A-516 (1994), it appears that the combined service areas for Television Station KWCH-TV and Satellite Television Stations KBSD-TV, KBSH-TV and KBSL-TV encompasses 526,900 television households. The total number of television households served is the equivalent of a station serving a market in the 51st - 100 market category. Thus, KBS will be assessed a single fee comparable to that of a VHF station in the 51st to 100 market category, or $8,000.

KBS has already paid $32,000 of its regulatory fees for full service and satellite stations. Thus, it is entitled to a refund of $24,000. A check, made payable to the maker of the original check in the amount of $24,000, will be sent to you at the earliest practicable time.

If you have any questions concerning the refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 17 1995

Alane C. Weixel, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566

Re: Request for Reduction in Regulatory Fees
KXAN, Inc.
Fee Control: # 9407298835088002
Fee Paid: $ 12,800

Dear Ms. Weixel:

This is in response to the Petition filed on behalf of KXAN, Inc. for a waiver of the Mass Media regulatory fees assessed for UHF Satellite Television Station KXAM-TV, Llano, Texas.

KXAM-TV is a satellite for UHF Television Station KXAN-TV, Austin, Texas. The Austin, Texas, television market is the 65th largest television market in the country. KXAN maintains that KXAM-TV serves a small, rural, sparsely populated area, and that it should not be required to pay a higher regulatory fee than other stations serving similarly ranked ADI markets. KXAN asks the Commission to waive the regulatory fee for UHF Satellite Station KXAM-TV. KXAN has paid an aggregate of $12,800 in regulatory fees for its full service and satellite television stations.

In establishing the Schedule of Fees for FY 1994, Congress did not distinguish between the fees assessed against fully operational television stations and television satellite stations. 47 U.S.C. § 159. However, in Implementation of Section 9 of the Communications Act, FCC 95-257, ¶¶ 18-20 released June 22, 1995, the Commission concluded that the assessment of regulatory fees would be particularly inequitable to licensees of full service stations which were also operating satellite stations serving rural and sparsely populated areas. The Commission, therefore, determined that for FY 1994, where licensees operating satellite stations have timely filed petitions for relief, waiver or reduction of the regulatory fees would be appropriate so that each set of parent and satellite stations will pay a regulatory fee based upon the total number of television households served. Thus, for FY 1994, licensees with satellite stations will be assessed a single regulatory fee comparable to the fee assessed stations serving markets with the same number of television households. FCC 95-257 at ¶ 20. Similar reductions, however, are not contemplated for FY 1995 because in Assessment and Collection of Regulatory Fees for Fiscal Year 1995, FCC 95-227, released June 19, 1995, the Commission adopted a reduced fee for satellite stations.

In our review of the Television and Cable Fact Book, Vol. 62, A-1103 and A-1155(1994), it appears that the combined service areas for UHF Television Station KXAN-TV and UHF Satellite Television Stations KXAM-TV encompasses 497,500 television households. The total number of television households served is the equivalent of a station serving a market in the 51st - 100th market category. Thus, KXAN will be assessed a single fee comparable to that of a UHF station in the 51st - 100th market category, or $6,400.

KXAN, Inc. has already paid $12,800 of its regulatory fees for full service and satellite stations. Thus, it is entitled to a refund of $6,400. A check, made payable to the maker of the original check in the amount of $6,400, will be sent to you at the earliest practicable time.

If you have any questions concerning the refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

Mr. Albert K. Smith
President
Lake County TV-FM, Inc.
P.O. Box 44
Leadville, CO 80461

Re: Request for Waiver of Regulatory Fees

Dear Mr. Smith:

This is in response to your request for an exemption from the regulatory fees for five television translator stations licensed to Lake County TV-FM, Inc.

You state that Lake County TV-FM is a non-profit corporation providing television service to outlying areas of Lake County, Colorado, and is therefore, exempt from the regulatory fees. You submitted a copy of Lake County TV-FM's Article of Incorporation showing that it is registered with the State of Colorado as a non-profit corporation.

In establishing the regulatory fee program, Congress provided an exemption from the fee requirement for nonprofit entities. 47 U.S.C. § 159(h). In Implementation of Section 9 of the Communications Act, FCC 95-257, released June 22, 1995, the Commission amended Section 1.1162(c) of its Rules, 47 C.F.R. § 1.1162(c), to exempt from regulatory fees:

> . . . an entity with current certification as a nonprofit corporation or other non-profit entity by a state or other governmental authority.

Thus, as a non-profit corporation, registered with the State of Colorado, Lake County TV-FM qualifies as a non-profit licensee under Section 9(h) of the Communications Act and Section 1.1163(c)of the Commission's Rules, and is therefore exempt from the Commission's regulatory fee requirements.

A copy of this letter should be included in any future correspondence with respect to imposition of the regulatory fees. If you have any question about the exemption, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

Jeffrey W. Malickson, Esquire
P.O. Box 32488
Charlotte, N.C. 28232

Re: Lynchburg Independent Broadcasters, Inc.
Petition to Waive Regulatory Fee

Dear Mr. Malickson:

This is in response to the petition for waiver of the Fiscal Year 1994 regulatory fee that you filed on behalf of Radio Station WWOD, Lynchburg, VA, licensed to Lynchburg Independent Broadcasters, Inc.

You state that WWOD has been dark since November 6, 1991 and that it has generated no revenue during that time.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15 (June 15, 1995), the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would therefore, waive the fee requirement for stations which have ceased operation.

Accordingly, your petition is granted and the FY 1994 regulatory fee for Lynchburg Independent Broadcasters, Inc. is waived. The waiver shall remain in effect until Radio Station WWOD is reactivated.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 1 6 1995

Alane C. Weixel, Esquire
Covington & Burling
1201 Pennsylvania Avenue N.W.
Washington, D.C. 20044-7566

Re: Request for Reduction in Regulatory Fees
Midwest Television, Inc.
Fee Control: #9409078835380008
Fee Paid: $14,000

Dear Ms. Weixel:

This is in response to the request filed on behalf of Midwest Television, Inc., for a waiver of the Mass Media regulatory fees assessed for UHF Satellite Television Station WCFN(TV), Springfield, Illinois.

WCFN(TV) is a satellite for VHF Television Station WCIA(TV), Champaign, Illinois. WCFN(TV) and WCIA(TV) are located in the Springfield-Decatur-Champaign, Illinois, market, which is the country's 75th largest market. Midwest maintains that it can only provide service to its entire market with the additional coverage provided by a satellite station. Midwest argues that it should not be required to pay a higher regulatory fee than other stations serving similarly ranked ADI markets, and it requests that the fee for satellite station WCFN(TV) be waived. Midwest has paid an aggregate of $14,400 in regulatory fees for its full service and satellite television stations.

In establishing the Schedule of Fees for FY 1994, Congress did not distinguish between the fees assessed against fully operational television stations and television satellite stations. 47 U.S.C. § 159. However, in Implementation of Section 9 of the Communications Act, FCC 95-257, ¶¶ 18-20 released June 22, 1995, the Commission concluded that the assessment of regulatory fees would be particularly inequitable to licensees of full service stations which were also operating satellite stations serving rural and sparsely populated areas. The Commission, therefore, determined that for FY 1994, where licensees operating satellite stations have timely filed petitions for relief, waiver or reduction of the regulatory fees would be appropriate so that each set of parent and satellite stations will pay a regulatory fee based upon the total number of television households served. Thus, for FY 1994, licensees with satellite stations will be assessed a single regulatory fee comparable to the fee assessed stations serving markets with the same number of television households. FCC 95-257 at ¶ 20.

Similar reductions, however, are not contemplated for FY 1995 because in Assessment and Collection of Regulatory Fees for Fiscal Year 1995, FCC 95-227, released June 19, 1995, the Commission adopted a reduced fee for satellite stations.

In our review of the Television and Cable Fact Book, Vol. 62, A-393 and A-423 (1994), it appears that the combined service areas for VHF Television Station WCIA(TV) and Satellite Television Station WCFN(TV) encompasses 533,300 television households. The total number of television households served is the equivalent of a station serving a market in the 26th - 50th market category. Thus, Midwest will be assessed a single fee comparable to that of a VHF station in the 26th - 50th market category, or $12,000.

Midwest has already paid $14,400 of its regulatory fees for full service and satellite stations. Thus, it is entitled to a refund of $2,400. A check, made payable to the maker of the original check in the amount of $2,400, will be sent to you at the earliest practicable time.

If you have any questions concerning the refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Thomas M. Halliran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

David Tillotson, Esquire
3421 M Street, N.W.
Washington, D.C. 20007

Re: Mountain Broadcasting Company, Inc.
Fee Control: #9408298835846001
Fee Paid: $250

Dear Mr. Tillotson:

This is in response to the request for a waiver and refund of the Fiscal Year 1994 regulatory fee that you filed on behalf of Mountain Broadcasting Company, Inc., licensee of Radio Station KBBV(AM), Big Bear Lake, California.

You state that KBBV(AM) has been dark since April 1991, and that it has generated no revenue during that time.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15, released June 22, 1995, the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would therefore, waive the fee requirement for stations which have ceased operation.

Accordingly, your petition is granted and the FY 1994 regulatory fee for Mountain Broadcasting Company, Inc. is waived, and the fee previously paid will be refunded. The waiver shall remain in effect until Radio Station KBBV(AM)is reactivated.

A check, made payable to the maker of the original check in amount of $250, will be sent to you at the earliest practicable time. If you have any questions concerning the refund, please call the Chief, Fee Section, at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Richard F. Swift, Esquire
Tierney & Swift
1200 18th St., N.W.
Washington, D.C. 20036

Re: New England Television, Inc.
Petition for Waiver of Regulatory Fee

Dear Mr. Swift:

This is response to the petition for waiver of the Fiscal Year 1994 regulatory fee, that you filed on behalf of New England Television, Inc. (NET), licensee of Television Station WHNT, Concord, New Hampshire.

You maintain that when NET acquired WHNT in 1992, the station was dark (not operating), and that because of illness and financing, NET has been unable to resume operation. An application for authority to assign the license to Boston University Communications, Inc. was granted on June 19, 1995.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15, released June 22, 1995, the Commission determined that it would waive the fee requirement for stations which are dark. Moreover, because WHNT has been dark during FY 1995, and NET has assigned its license, the Commission will waive NET's regulatory fees for both FY 1994 and FY 1995.

A copy of this letter should be maintained and submitted with any future correspondence concerning the imposition of regulatory fees for WHNT. If you have any questions concerning the regulatory fees, please call the Chief, Fee Section at (202) 418-1955.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 18 1995

William L. Zawila, Esquire
12550 Brookhurst Street
Garden Grove, California 92640

Re: Radio Station KNGS(FM)
Coalinga, CA

Dear Mr. Zawila:

This is in response to the petition that you filed requesting waiver of the Fiscal Year (FY) 1994 regulatory fee for a construction permit for Radio Station KNGS, Coalinga, California.

You state that KNGS' construction permit expired on May 3, 1993. KNGS has filed both a Form 307 application for extension of its construction permit and Form 301 to modify that permit. As of the date of your waiver request, neither application had been granted. You contend that because the permit has expired, KNGS should be exempt from the regulatory fee.

In formulating the Schedule of Regulatory Fees, Congress established substantially lower fees ($500) for construction permits than for licensed stations. When a permit expires and an applicant files for its extension and also for modification, the staff must review any legal, engineering, or FAA issues related to the request. However, during the pendency of these applications, the permittee retains an interest in the permit, and, therefore, the frequency is not available to other potential licensees. Consequently, the mere fact that a permit has expired, standing alone, is not a basis for waiver.

Action on the extension of KNGS' permit now awaits FAA clearance of its modified tower proposal. Under these circumstances, the pendency of the extension request by KNGS results solely from its modification of its engineering proposal, and the time required to obtain FAA clearance. Moreover, KNGS remains the only party with an identifiable interest in the construction permit. Thus, KNGS' request for waiver must be denied.

Payment of KNGS' FY 1994 regulatory fee in the amount of $500 is now due. KNGS should file a completed FCC Form 159 (copy enclosed), together with the $500 regulatory fee payment, within 30 days from the date of this letter. Failure to submit that amount in a timely manner may subject KNGS to a 25% penalty, as well as other sanctions under 47 CFR § 1.1164 of the Commission's Rules.

If you have any questions concerning payment of KNGS' regulatory fee, please call the Chief, Fee Section, at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Suzanne Meyer Perry, Esquire
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Washington, D.C. 20037-1194

Re: Request for Reduction of Regulatory Fees
Stauffer Communications, Inc.
Fee Control # 9409078835462001
Fee Paid: $22,000

Dear Ms. Perry:

This is in response to the request filed on behalf of Stauffer Communications, Inc., requesting a reduction in the Mass Media regulatory fees assessed for its three VHF Television Satellite Stations, KGWL-TV, Lander, Wyoming, KGWR-TV, Rock Springs, Wyoming, and KTVS, Sterling, Colorado.

KGWL-TV and KGWR-TV are satellites for UHF Television Station KGWC-TV, Casper, Wyoming. KTVS is a satellite for VHF Television Station KGWN-TV, Cheyenne, Wyoming. KGWC-TV, KGWN-TV, and satellite stations KGWL-TV and KGWR-TV are located in the remaining markets, which are markets with smaller populations than the top 100 markets. KTVS is located in the Denver market, which is the 20th largest market. Stauffer argues that in Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333, 5361 ¶ 82 (1994), the Commission held that "where a licensee would be required . . . to pay a higher fee for its satellite station than for the parent station, . . . [it] will entertain petitions to reduce the satellite station's fee to the same amount as the fee due for the parent station." As a result, for Fiscal Year 1994 (FY 1994), Stauffer paid regulatory fees of $4,000 (or an aggregate of $12,000) for UHF Television station KGWL-TV and each of its satellite stations, and fees of $5,000 (or an aggregate of $10,000) for VHF Television Station KGWN-TV and its satellite station.

In establishing the Schedule of Fees for FY 1994, Congress did not distinguish between the fees assessed against fully operational television stations and television satellite stations. 47 U.S.C. § 159. However, in Implementation of Section 9 of the Communications Act, FCC 95-257, ¶¶ 18-20 released June 22 1995, the Commission concluded that the assessment of regulatory fees would be particularly inequitable to licensees of full service stations which were also operating satellite stations serving rural and sparsely populated areas.

The Commission, therefore, determined that for FY 1994, where licensees operating satellite stations have timely filed petitions for relief, waiver or reduction of the regulatory fees would be appropriate so that each set of parent and satellite stations will pay a regulatory fee based upon the total number of television households served. Thus, for FY 1994, licensees with satellite stations will be assessed a single regulatory fee comparable to the fee assessed stations serving markets with the same number of television households. FCC 95-257 at ¶ 20. Similar reductions, however, are not contemplated for FY 1995 because in Assessment and Collection of Regulatory Fees for Fiscal Year 1995, FCC 95-227, released June 19, 1995, the Commission adopted a reduced fee for satellite stations.

In our review of the Television and Cable Fact Book, Vol. 62, A-1296, A-1302,and A-1304 (1994), it appears that the combined service areas for Television Station KGWC-TV and Satellite Television Stations KGWL-TV, and KGWR-TV encompasses 81,600 television households. Similarly, the combined service area for Television Station KGWN-TV and Satellite Television Station KTVS encompasses 205,600 television households. The total number of television households served for each set of parent and satellite stations is the equivalent of a station serving a non-top 100 or remaining market. Thus, Stauffer will be assessed a single fee comparable to that of a UHF station in the remaining market category, or $4,000, for KGWC-TV and its satellite stations, and a single fee comparable to a VHF station in the remaining market category, or $5,000, for KGWN-TV and its satellite station. The aggregate fee assessed for the television and satellite stations is $9,000.

Stauffer has already paid $22,000 of its regulatory fees for full service and satellite stations. Thus, it is entitled to a refund of $13,000. A check, made payable to the maker of the original check in the amount of $13,000, will be sent to you at the earliest practicable time.

If you have any questions concerning the refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 13 1995

Cara Ebert Cameron, Esquire
2929 East Commercial Boulevard
Penthouse C
Fort Lauderdale, FL 33308

Re: Petition for Waiver of Regulatory Fee
Radio Stations KSKE and KSKE-FM
Vail, Colorado

Dear Ms. Cameron:

This is in response to the Petition for Waiver of Regulatory Fee that you filed on behalf of Debbie Varecha, Receiver for Vail Broadcasting Systems, Inc., licensee of Radio Stations KSKE and KSKE-FM, Vail, Colorado.

You maintain that Verecha is the court appointed receiver for KSKE and KSKE-FM and that the radio stations lack funds to pay the regulatory fees.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 14 released June 22, 1995, the Commission found that a bankruptcy or receivership is sufficient to establish financial hardship, and that imposition of the regulatory fee could act as an impediment to the efforts of a trustee, debtor in possession, or receiver to assign a license to a new licensee. Thus, the Commission held that it would waive the regulatory fees for licensees whose stations are bankrupt, undergoing Chapter 11 reorganizations or are in receivership.

Accordingly, your petition is granted. The FY 1994 Regulatory Fees for KSKE and KSKE-FM are waived. If you have any questions concerning this waiver please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Thomas M. Gillen for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 5 1995

William L. Zawila, Esquire
12550 Brookhurst Street
Garden Grove, CA 92640

Re: Western States Broadcasting, Inc.
Request for Waiver of Regulatory Fees

Dear Mr. Zawila:

This is in response to the request for waiver of the Fiscal Year 1994 regulatory fees that you filed on behalf of Radio Stations KWSA(AM), West Klamath, Oregon, and KCQH(FM), Altamont, Oregon, both licensed to Western States Broadcasting, Inc.

You maintain that payment of the fee would present a hardship because both stations are off the air and have suffered earthquake damage.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15, released June 22, 1995, the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would therefore, waive the fee requirement for stations which have ceased operation.

Accordingly, your request is granted and the FY 1994 regulatory fees for Western States Broadcasting, Inc. are waived. The waivers shall remain in effect for each station until it resumes service.

If you have any questions about the regulatory fees, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Price Cap Performance Review for Local Exchange Carriers | ) | CC Docket No. 94-1 |

**FIRST REPORT AND ORDER**

Adopted: March 30, 1995; Released: April 7, 1995

By the Commission: Commissioners Quello and Barrett issuing separate statements; Commissioner Ness dissenting and issuing a statement; Commissioner Chong issuing a separate statement.

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The price cap plan the Commission adopted in 1990 for local exchange carriers (LECs) is designed to mirror the efficiency incentives found in competitive markets, thus acting as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary. It does this by encouraging LECs to move prices for interstate access services to economically efficient levels, to reduce costs, to invest efficiently in new plant and facilities, and to develop and deploy innovative service offerings. Under the existing plan, price cap indexes limit the maximum prices that LECs may charge for their interstate services. The indexes are adjusted each year in accordance with a formula that accounts for industry-wide changes in unit costs. The price cap plan rewards LECs that exceed the productivity target by permitting them to retain higher profits than they would be allowed to retain under rate-of-return regulation.

2. The price cap regulatory regime protects consumers by restricting the maximum prices that LECs may charge for interstate services. The current scheme, moreover, creates incentives for LECs to set prices for these services at lower, more efficient levels in order to generate greater usage of the telephone network. The performance of the interstate long distance industry over the past 10 years demonstrates that reducing the prices for telecommunications services to more economically efficient levels can have a dramatic impact on the demand for those services. For example, since 1984, decreases in the prices for interstate toll services caused by Federal Communications Commission reforms in the pricing of interstate access services and competition among long distance companies helped stimulate a 100 percent increase in interstate long distance calling.[1]

3. The price cap plan also creates incentives for LECs to invest efficiently in new facilities and to offer innovative services that will lead to increased usage of the telephone network. More efficient use of the nationwide telecommunications network contributes to economic growth by reducing the cost of telecommunications services that are used by other industries to produce goods and services. In addition, creating incentives for efficient investment and new service deployment allows market forces -- not regulation -- to determine the pace of infrastructure development.

4. With appropriate modifications, the current price cap system could facilitate the transition to competition in local

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[1] Statistics of Communications Common Carriers, 1993/1994 Federal Communications Commission 309 (1994).

telecommunications markets. The current price cap scheme is designed to maintain regulation of LEC interstate telecommunications services as long as regulation is needed to ensure that prices are just, reasonable and non-discriminatory. Our experience in regulating AT&T and the LECs under price caps shows that this regulatory regime does not hinder the development of competition for telecommunications services; rather, it is an appropriate transitional mechanism. The current LEC service baskets and pricing bands provide the carriers with greater flexibility in pricing their interstate access services than they possessed under rate-base/rate-of-return regulation. This flexibility gives the LECs the ability to adjust their prices to a limited extent in response to competitive entry. In this Order we increase that flexibility in significant ways. Finally, and most importantly, this price cap plan can be adapted as competitive markets develop for particular services. In the case of AT&T, for example, the emergence of competitive markets for specific interstate long distance services led us to remove those services from price cap regulation and subject them to streamlined regulation.[2]

5. We commenced this proceeding to undertake a comprehensive review of the performance of this LEC price cap plan over the past four years. The Notice of Proposed Rulemaking[3] issued in this docket invited comments on three broad categories of issues: (a) whether the principal policy goals of LEC price cap regulation should be modified; (b) whether changes to the existing regulatory system are warranted in light of the first four years of experience; and (c) whether adjustments to the scheme are needed to adapt the plan to changes in the marketplace, technology and regulation that may occur over the next few years.

6. Our request for comments on the various elements of our existing system of LEC price cap regulation elicited responses from a broad and diverse array of parties representing virtually every segment of the telecommunications industry, including LECs, interexchange carriers (IXCs), telecommunications user groups, and consumer groups. In addition to the extensive comments and reply comments that were submitted during the pleading cycle established in the Notice, we received numerous ex parte submissions. In many of these filings, particularly more recent ones, parties modified, in some cases significantly, the

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[2] Revisions to Price Cap Rules for AT&T, Report and Order, CC Docket No. 93-197, FCC No. 95-18 (released Jan. 12, 1995).

[3] Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994) (Notice).

positions advanced in their original comments.[4]

7. In this Report and Order, we adopt interim LEC price cap rules that reflect our commitment to the policy objectives that guided our adoption of LEC price cap regulation almost five years ago. Specifically, these interim rules affirm the proposition that, in order to replicate the effects of a competitive market, LEC price cap regulation should create incentives for carriers to set prices for services at economically efficient levels, to offer new services that are responsive to consumer demand, and to invest in new facilities that are needed to provide service efficiently. Overall, this interim price cap plan should encourage LECs to make economic decisions that they would make if their markets were competitive. We believe that accomplishing this objective will ensure that prices for LEC interstate services are just, reasonable and non-discriminatory.

8. None of the commenting parties contends that we should repeal price cap regulation for the LECs and reinstate rate-of-return regulation. Rather, the parties devoted most of their attention to three principal aspects of our current regulatory regime: (a) whether we should modify or eliminate the sharing and low-end adjustment mechanisms; (b) whether we should make a one-time adjustment to the current price cap indexes or rates; and (c) what is the appropriate method for setting the annual productivity adjustment ("X-Factor").

9. The record in this proceeding contains two primary proposals for setting the X-Factor for now and for the future. The United States Telephone Association ("USTA"), a LEC trade association, urges us to set the X-Factor on the basis of the industry-wide total factor productivity (TFP) achieved by the price cap LECs. Further, USTA proposes that we compute and update the TFP annually on the basis of a moving five-year average of the industry-wide TFP. This would obviate the need for us to conduct periodic proceedings like this one to recalibrate the X-Factor.

10. AT&T, by contrast, contends that we should set the X-Factor by computing the average industry productivity gain on the basis of price cap LECs' interstate earnings. Specifically, AT&T recommends that we determine the LECs' efficiency growth by comparing average industry interstate earnings to the 11.25 percent rate of return that LEC rates were targeted to earn at the time that they became subject to price cap regulation. The resulting X-Factor would then be utilized until the next price

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[4] Appendix A lists all parties who have filed comments in this proceeding. The listing provides both the complete name and the abbreviated name, which is used throughout the text of our decision, of each party.

cap review.

11. Both of these proposals generally have been the subject of extensive comments submitted in the established pleading cycle as well as in numerous ex parte filings. However, because USTA presented the moving average aspect of its proposal in an ex parte filing submitted late in the proceeding, it was not available for the thorough review and analysis that proposals advanced in the formal comment phase received, although our analysis to date does indicate that it has a number of features that would recommend its adoption. Therefore, pending further comment and analysis of this issue in the further notice in this proceeding, we tentatively conclude that the TFP approach with the moving average advocated by USTA represents a sound method of computing the X-Factor because it is designed to pass through to rate-payers the average efficiency gains achieved by the price cap LECs as a whole, and because it creates incentives for all LECs to surpass the industry average in productivity gains from year to year.

12. With respect to the TFP method, USTA calculates TFP growth as the percentage change in output per unit of input. USTA insists that the calculation of the X-Factor should reflect only the difference between LEC TFP growth and U.S economy TFP growth, and should not include the percentage change in the LECs' input prices, relative to the economy as a whole. Other parties contend that a TFP-based X-Factor must also reflect input price changes over the same period on which the productivity calculation is based. This adjustment would have a significant impact on the calculation of the X-Factor for the period studied by USTA. In addition, several parties criticize USTA's proposed approach because it is based on total company TFP, rather than just interstate productivity gains. Several parties also have raised concerns about the availability and reliability of data needed to compute TFP, and about the determination of a specific method for computing TFP.

13. With respect to the AT&T method, the LECs contend that this approach presents a distorted view of their efficiency performance because their earnings are inflated by regulatory accounting and cost separation rules that do not reflect economic costs. LECs maintain, in particular, that FCC-mandated schedules significantly understate the pace of economic depreciation of their network investment and, consequently, overstate their reported earnings.

14. We believe that the questions raised with respect to the merits of each of these approaches warrant further exploration before we make a final choice of method for setting the X-Factor. Accordingly, we intend promptly to issue a further notice of proposed rulemaking in this proceeding in which we will seek comment on specific issues concerning each of these models

and to invite parties to recommend other models that would meet our objectives. We also intend to seek comment of whether the price cap plan adopted at the end of the further notice proceeding should establish at least two X-Factor options in order to account for the variations in performance among LECs under price cap regulation.

15. The parties to this proceeding also devoted considerable attention in their comments and ex parte submissions to the issue of sharing. The Commission recognized in adopting the original LEC price cap plan that the sharing mechanism could reduce the incentives of LECs to increase their economic efficiency, in the same way that rate-of-return regulation discourages such efforts -- by limiting the effective earnings the LECs may retain through increased productivity. Nevertheless, the Commission decided to impose the mechanism as a "backstop" against the possibility that the X-Factor selected for the LECs proved to be an inaccurate measure of their productivity growth rate, either for the industry as a whole or for individual LECs.

16. Based on our experience over the initial four years of LEC price cap regulation and the extensive record developed in this proceeding, we conclude that the sharing mechanism is not essential to ensuring that LEC rates under price cap regulation remain just and reasonable. We can fulfill our duty to ensure that rates are just and reasonable in many ways, and the record suggests that a plan that captures for consumers the difference between the rate of cost change in the economy as a whole and the rate of change in the cost per unit of output for LECs under price cap regulation will attain that goal. In calculating a productivity factor that meets this objective, we are mindful of past differences in performance and productivity choices among LECs, that these differences are likely to become more apparent over time, and that not every LEC will be as productive as is the industry on average. We are concerned, however, that sharing may continue to be necessary in a price cap plan that establishes two or more X-Factor options as a means of creating incentives for LECs to reach for higher productivity levels. We intend to invite comment in the next phase of this proceeding on the need to retain sharing in a multiple X-Factor price cap plan, and on the efficacy of possible alternatives to sharing in such a regulatory system.

17. We believe that our decision to develop a more complete record with respect to the appropriate method of calculating the X-Factor and related issues concerning the elimination of sharing requirements is prudent in light of the rapidly changing conditions in the telecommunications industry generally and the local exchange market in particular. The pace of these changes has accelerated significantly since the issuance of the Notice in this docket and may account, in part, for the succession of ex

parte submissions that were filed in this docket after the formal pleading cycle ended. The following are just some of the events that are dramatically altering the contours of the telecommunications industry and the market conditions confronting LECs: the advent of new wireless telecommunications services that may compete directly with the wireline LECs; the efforts of individual LECs to open their markets to competition in exchange for greater pricing flexibility; the restructuring of the telecommunications industry through strategic alliances and mergers; efforts by state regulatory agencies to remove barriers to entry into local telecommunications markets; and Congressional proposals that are directed to expanding competition in local telecommunications and video markets.

18. Our decision to seek further comment on the X-Factor proposals requires us to consider what changes, if any, may be necessary or appropriate to our current plan to ensure just and reasonable interstate access rates during the pendency of the next phase of this proceeding. Based on our review of the LECs' performance over the past four years and the record in this proceeding, we reach three general conclusions. The first is that the initial X-Factor was set lower than our analysis now supports. Second, the sharing mechanism creates perverse incentives and the plan should be designed to encourage as many LECs as possible to elect a no-sharing option. Third, to better reflect the differences in productivity potential among the price cap LECs and increase their incentive to move to higher productivity levels, the current plan should be modified to include a third X-Factor option.

19. We conclude that we should adjust the minimum X-Factor upward to 4.0 percent. This adjustment is necessary to correct an error in our calculation of the current 3.3 percent X-Factor caused by the inclusion of a data point in a study used to establish that factor that we believe does not accurately reflect LEC productivity trends. We also conclude that we should establish two higher options. The current plan includes a higher, optional X-Factor of 4.3 percent, one percentage point above the minimum X-Factor. We have decided not to simply replicate the current arrangement by adjusting the higher X-Factor to 5.0 percent. Instead, we will establish two optional X-Factors at equal intervals above and below that level. The X-Factors thus will be 4.0, 4.7, and 5.3. We believe that establishing the highest X-Factor at 5.3 percent presents a sufficiently challenging target to permit us to eliminate sharing at this option for the interim plan. The upward adjustment above 5.0 percent is appropriate, both as a means of ensuring that consumers continue to pay just and reasonable rates and to pass on to consumers some of the benefits that will derive from the elimination of sharing. We further conclude that creating a middle option of 4.7 percent will serve our goal of establishing X-Factor options that take account of the heterogeneity in the

performance of the LECs under price caps.

20. Our ideal in making these adjustments would be to create a price cap system in which every LEC seeks to maximize its productivity without incurring sharing obligations. The creation of multiple X-Factor options, however, requires tightening of the sharing rules applicable to the lower options. Based on our examination of the existing record, we believe that, for purposes of implementing this interim plan, sharing in a multi-option plan is needed to ensure that the public obtains the greatest possible benefits from LEC efficiency gains. We conclude that the sharing ranges around the lowest option should be narrowed so that only LECs that have lower efficiency growth rates will have an incentive to select that option, while those with higher growth rates will have an incentive to elect the higher options due to lesser or no sharing requirements. Specifically, we conclude that LECs selecting the lowest option of 4.0 will be required to share 50 percent of their earnings from 12.25 percent up to and including 13.25 percent and to share 100 percent of their earnings above 13.25 percent. LECs selecting the middle option of 4.7 percent will be required to share 50 percent of their earnings from 12.25 percent up to and including 16.25 percent and to share 100 percent of their earnings above 16.25 percent. LECs electing either of the lower options will be permitted to make a low-end adjustment if their earnings fall below 10.25 percent in a year. LECs selecting the highest option of 5.3 percent will not incur sharing obligations and will not be entitled to a low-end adjustment.

21. We believe that these revisions to our existing price cap scheme create reasonable choices for the LECs that will encourage them to continue to increase their rate of efficiency growth while we are conducting the next stage of this proceeding.

22. In view of our correction to the methodology used to compute the original X-Factor, we conclude that a corresponding correction to, or reinitialization of, the current price cap indexes of LECs that elected the lower X-Factor of 3.3 percent during the past four years is necessary. Accordingly, we require these LECs to reduce their current indexes by .7 percent for each year in which they elected the lower option, appropriately compounded. Moreover, as explained below, no adjustment is required for a year in which a LEC selected the higher 4.3 percent option.

23. We invited comment in the Notice on whether our current formula for adjusting the price cap index for the Common Line basket should be revised. Based on the comments submitted in this docket, we find merit in the recommendation that we should adopt a "per line" formula for adjusting this index, in lieu of the current balanced 50-50 sharing formula. We conclude, however, that we should not revise the current formula until we

have completed our further rulemaking. Doing so would require LECs to recompute all of their price cap indexes. More significantly, the method that we ultimately select for calculating the X-Factor may obviate the need to apply a price cap index to the Common Line basket, because productivity growth in the services within that basket may be reflected in the X-Factor.

24. We also asked parties to comment on whether our rules governing exogenous costs should be revised in light of our experience over the past four years. We conclude that we should revise the criteria to be applied in determining whether a cost change attributable to a change in accounting rules is eligible for exogenous treatment. We will require LECs to demonstrate that the cost change is beyond their ability to control, is not reflected in the formula used to adjust the price cap indexes, and has an impact on the cash flow of the LEC. We find that this revision will properly exclude from eligibility for exogenous treatment cost changes that result from changes in accounting costs, but otherwise have no economic consequences.

25. Finally, we invited comment in the Notice on a variety of questions concerning the manner in which our current LEC price cap plan should be modified in order to adapt the system to the emergence of competition in local access and exchange telecommunications markets. There is growing evidence that an increasing variety of local telecommunication services is available on a competitive basis. This trend is most pronounced in larger urban areas where new entrants appear to be marketing their transport and other local services to high-volume toll users that offer the most lucrative returns. On the other hand, the competitive access industry is still very small. Our price cap system of regulation must be adaptable to the development of competition in local markets and, where possible, encourage the development of efficient competition. Specifically, we must relax regulatory restraints on LECs in markets as competition develops and a competitive presence is established. At the same time, we must retain the ability to regulate the significant set of services that are still provided on less than a fully competitive basis. As USTA has acknowledged,[5] fundamental issues concerning the manner in which our price cap regime should be modified to address the development of competition should be a central issue in the further notice.

26. We find it appropriate now to expand the lower pricing bands that apply to the service categories within the traffic sensitive and trunking baskets by 5 percent to give the LECs additional downward pricing flexibility without risking predation

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[5] Letter from Mary McDermott, USTA, to Acting Secretary, Commission, January 18, 1995 (January 18 Letter), at 7.

or cross-subsidization. We find that the remainder of the transition issues, such as the standards to be used for evaluating the state of competition in particular markets for purposes of reducing or streamlining regulation, are best handled together with the issues that we have deferred to the further notice and will be similarly deferred.

## II. BACKGROUND

27. As we discussed in the Notice,[6] the Commission adopted price cap regulation as a means of both improving common carrier rate regulation and adapting it to the dramatic changes in communications technology, market structures, and services that have occurred over the last few decades. Traditional rate-of-return regulation provides few incentives for carriers to become more innovative and efficient, and encourages cost-shifting by carriers that participate in both competitive and noncompetitive markets.[7] Because rate-of-return regulation sets regulated rates to recover the carrier's expenses plus a reasonable rate of return on invested capital, a carrier can seek to recover some of its costs incurred in competitive markets by assigning those costs to services that are not subject to competitive price constraints. Prevention of cost-shifting among services, between regulated and nonregulated activities, and between regulatory jurisdictions requires elaborate regulatory oversight of all the carrier's costs. Carriers achieving the prescribed rate of return also have little profit incentive to introduce new and innovative services, because they would not be permitted to retain the additional earnings from the new services.

28. Price cap regulation, in contrast, can create profit incentives similar to those in fully competitive markets and generates positive motivations for efficient rates, innovation, productivity growth and accurate cost allocation, while reducing regulatory burdens. The price cap limits are set by the Commission to ensure that rates remain within a zone of reasonableness. Prices are held to a maximum level by the cap, much as they are by the rivalry among companies in competitive markets. The carrier gains the opportunity to earn higher profits by operating more efficiently or by developing new services customers want, not by raising overall prices. This opportunity to increase its profits in turn encourages the carrier to apply its resources in the most efficient manner possible, providing more and better service at lower cost. By

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[6] Notice, 9 FCC Rcd at 1688.

[7] See, e.g., H. Averch and L. Johnson, Behavior of the Firm Under Regulatory Constraint, 52 Amer. Econ. Rev. 1052 (1962); 2 A.E. Kahn, The Economics of Regulation, ch. 2 (1971); and K.E. Train, Optimal Regulation, ch. 1 (1991).

increasing its productivity, the carrier can increase its profitability.

29. At the same time, customers directly benefit from lower prices and new services that better meet their needs, and indirectly from the lower costs of non-telecommunications goods and services provided by firms that use telecommunications in their business. Customers are also protected from cross-subsidization by the grouping of services in price cap baskets, which prevents a carrier from raising rates in one basket and lowering them in another to the detriment of customers using services in the first basket.[8] Rate bands within the baskets are adjusted annually and protect customers from rapid rate increases by requiring a carrier to make a special showing to raise rates above the level allowed by the applicable rate band.[9] The rate bands also act as a check against predatory pricing by requiring a carrier to justify a rate decrease that exceeds the band limitation.

30. Under the LEC price cap plan,[10] the carriers' interstate services are grouped within four baskets. Rates within each basket are capped based on a formula that limits the maximum percentage rate change to the rate of inflation (measured by the Gross National Product Price Index or GNP-PI) minus an X-Factor that sets a productivity improvement threshold. For the LECs, the X-Factor was set at a minimum of 3.3 percent annually, reflecting studies of historical telephone industry productivity growth and a Consumer Productivity Dividend of 0.5 percent.[11] The price cap formula is also adjusted for a limited set of exogenous cost changes, generally those caused by changes in administrative, legislative, or judicial action beyond the carrier's control and not otherwise reflected in price cap

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[8] Section 61.42(d)-(g) of the Commission's Rules, 47 C.F.R. §61.42(d)-(g).

[9] Section 61.47 of the Commission's Rules, 47 C.F.R. §61.47.

[10] The price cap rules are codified at Sections 61.41-61.49 of the Commission's Rules, 47 C.F.R. §§61.41-61.49. See also Section 61.1(c), 47 C.F.R. §61.1(c).

[11] The 3.3 percent minimum X-Factor applies to the three access service baskets. For the Interexchange basket, the X-Factor was set at 3.0 percent to match the factor established for AT&T's interexchange services, and was not based on the studies used to set the X-Factor for the other LEC baskets.

calculations.[12] This formula produces the Price Cap Index (PCI) for the basket. Within a basket, rate changes in any one year may also be limited by rate bands, computed for a designated service category around a subindex, called the Service Band Index (SBI).[13]

31. Rate changes that conform to the limits set by a LEC's PCIs and SBIs are presumed lawful and permitted to take effect under streamlined review and on 14 days' notice. Should a LEC decide to file rates outside the PCI or SBI limits, the price cap rules call for more rigorous scrutiny. More extensive cost documentation must be filed, the presumption of lawfulness is removed, and longer notice periods apply. Above-cap and above-band filings carry a heavy burden of justification and strong likelihood of suspension. For new services that will be subject to price caps, the carrier must submit a study of projected costs or net revenue effects.[14]

32. In contrast to the pure price cap plan adopted for AT&T, the Commission adopted a hybrid plan for the LECs, which retained features of rate-of-return regulation. The rate-of-return "backstop" was intended to compensate for the possibility of inaccuracy in our calculation of the X-Factor and for variations among the different LECs. Under the backstop sharing mechanism, if a LEC elects the minimum 3.3 percent X-Factor, thus reducing its rates by 3.3 percent annually after adjustment for inflation and exogenous cost changes, it is allowed to retain all earnings up to 12.25 percent, and half of all higher earnings up to 16.25 percent. All earnings above 16.25 percent return to ratepayers through adjustments to the PCIs in the following year. Alternatively, LECs may elect a more challenging 4.3 percent X-Factor, and earn the right to retain all earnings up to 13.25 percent and half of all higher earnings up to 17.25 percent. All earnings over 17.25 percent return to ratepayers, once again through adjustments to the PCIs in the following year. Conversely, under the low-end adjustment mechanism, if a LEC's earnings fall below 10.25 percent in any calendar year, the LEC is granted an automatic one year upward adjustment in its PCI in the next year, sufficient to bring its earnings back up to 10.25 percent. The rate-of-return thresholds in the sharing and low-end adjustment mechanisms were adopted in conjunction with the Commission's prescription of 11.25 percent as a reasonable target

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[12] Section 61.45(d)(1) of the Commission's Rules, 47 C.F.R. § 61.45(d)(1).

[13] Section 61.47 of the Commission's Rules, 47 C.F.R. §61.47.

[14] Section 61.49(b) of the Commission's Rules, 47 C.F.R. §61.49(b).

for rate-of-return carriers beginning in 1990.

33. The LEC price cap plan is mandatory for the largest LECs, the seven Regional Bell Operating Companies (RBOCs) and GTE. It is optional for other LECs. If a company elects price caps, all of its affiliated companies, with the exception of any average schedule affiliates, must also become price cap carriers.[15] Those LECs electing price caps include United Telephone, Rochester Telephone, The Lincoln Telephone and Telegraph Company, and Southern New England Telephone.[16]

34. Although the LEC price cap plan was intended to remain relatively stable during its first four years, changes in the plan have been made in response to related regulatory changes, judicial decisions, and technological advances. In the Second Transport Order, the Commission modified the LEC price cap basket and service category structure, as well as the pricing bands applicable to the service categories, to complement the Commission's restructuring of the LECs' local transport rates.[17] Also, after adopting rules that permit the LECs to offer video dialtone service and after concluding that video dialtone service offerings by price cap LECs would be subject to the existing price cap rules, the Commission recently proposed establishing a separate price cap basket for video dialtone services.[18]

35. Some aspects of the rules have required interpretation or amendment. The rules for calculating earnings for purposes of applying the backstop mechanisms did not state whether the effects of a sharing or low-end adjustment resulting from the prior year's earnings should be eliminated from the calculation of the current year's earnings. This ambiguity in the rules gave

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[15] LEC Price Cap Order, 5 FCC Rcd at 6819-21. This "all or nothing" rule eliminates the possibility that a price cap LEC could shift costs to an affiliate that remained under rate-of return-regulation.

[16] Notice, 9 FCC Rcd at 1689.

[17] Transport Rate Structure and Pricing, CC Docket No. 91-213, 9 FCC Rcd 615, 615-16 (1994) (Second Transport Order).

[18] Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, CC Docket No. 94-1, FCC 95-49 (released Feb. 15, 1995); see also id. at para. 12 (the Commission also requested comment on whether a new price cap basket should be established that would include not only video dialtone services, but also other broadband, transport-related services).

rise to investigations of several price cap tariff filings[19] and required us to adopt a new rule explicitly incorporating a prospective "add-back" requirement for purposes of calculating the earnings used to determine the sharing and low-end adjustments under the LEC price cap plan.[20] Further, the Commission's decision to deny exogenous cost treatment for the LECs' cost changes resulting from a change in generally accepted accounting practices (GAAP) for employee postretirement liabilities other than pensions (commonly known as "other postretirement employee benefits" or "OPEBs")[21] was found to be arbitrary and capricious by the United States Court of Appeals for the District of Columbia Circuit.[22]

36. In addition to revising the LEC price cap rules, the Commission has enhanced its monitoring of the LECs' service quality and infrastructure reporting requirements. In the LEC Price Cap Order, the Commission decided to significantly expand the monitoring of service quality and infrastructure development to assure the availability of high-quality, innovative communications services, and the development of the

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[19] 1993 Annual Access Tariff Filings, CC Docket, No. 93-193, National Exchange Carrier Association, Transmittal No. 556, Universal Service Fund and Lifeline Assistance Rates, CC Docket No. 93-123, GSF Order Compliance Filings, Bell Operating Companies Tariffs for the 800 Service Management System and 800 Data Base Access Tariffs, CC Docket No. 93-129, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, 8 FCC Rcd 4960 (Com.Car.Bur. 1993).

[20] Price Cap Regulation of Local Exchange Carriers; Rate-of-Return Sharing and Lower Formula Adjustment, CC Docket No. 93-179, FCC 95-47 (adopted Mar. 30, 1995). The add-back rule requires price cap LECs to eliminate the effects of sharing or low-end adjustments required by the prior year's earnings on the current year's earnings. The current year's earnings, thus adjusted, determine whether sharing is required, or a low-end adjustment is permitted, in the next tariff year. Id.

[21] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other than Pensions", CC Docket No. 92-101, 8 FCC Rcd 1024 (1993) (OPEBs Order).

[22] Southwestern Bell Telephone Company v. FCC, 28 F.3d 165 (D.C. Cir. 1994); see also id. (the Court remanded to the Commission to consider the LECs' request for exogenous cost treatment for their incremental costs resulting from the mandated accounting change in a manner consistent with the court's opinion and the LEC Price Cap Order and LEC Price Cap Reconsideration Order).

telecommunications infrastructure needed to provide these services.[23] In particular, the Commission determined that all price cap LECs would be required to file quarterly service quality reports, and that mandatory price cap LECs would also be required to file semi-annual service quality reports and annual infrastructure reports.[24] Under delegated authority, the Common Carrier Bureau established specific service quality and infrastructure reporting requirements[25] that "balance the need for data that will accurately reflect trends in service quality and infrastructure development with our goal of minimizing the administrative costs of LECs."[26]

37. In Part III.A. of this Report and Order, below, we report and analyze the results of the first four years of the LEC price cap program. Part III.B. addresses the broad policy goals of price caps. In Part IV we discuss, and adopt interim changes to, core features of the price caps rate formula: the productivity factor (IV.B.) and the rate of return backstop mechanisms (IV.C.). We also adopt a one-time rate decrease to correct for previous errors in the calculation of the productivity factor (IV.D.). Part V addresses other matters that we identified as "baseline" issues in the Notice: the common line formula (V.A.); exogenous cost adjustments (V.B); sales and swaps of exchanges (V.C.); equalization of regulations for LECs and CAPs (V.D.); the inflation measure used in the price cap formula (V.E); and service quality, infrastructure monitoring, and network reliability (V.F.). Part VI addresses transition issues: reducing or streamlining regulation; revising baskets; basket and band flexibility; and rates and regulations for new services.

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[23] LEC Price Cap Order, 5 FCC Rcd at 6827, 6829.

[24] LEC Price Cap Order, 5 FCC Rcd at 6827-39.

[25] See Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, 6 FCC Rcd 2974 (Com.Car.Bur. 1991) (Service Quality Order), modified, 6 FCC Rcd 4819 (Com.Car.Bur. 1991), further modified, Public Notice, Adjustments to Price Cap Carriers' Service Quality and Infrastructure Reports in ARMIS, 7 FCC Rcd 3590 (released Mar. 31, 1992), further modified, Public Notice, Modifications to Service Quality Infrastructure Reporting, 7 FCC Rcd 4632 (released July 7, 1992), modified, Public Notice, ARMIS Filing Requirements, 7 FCC Rcd 8795 (Com.Car.Bur., released Dec. 15, 1992) and Erratum, DA 92-1696 (Com.Car.Bur.; released Dec. 18, 1992), further modified, 8 FCC Rcd 7259 (Com.Car.Bur. 1993) (Modified Service Quality Order).

[26] Service Quality Order, 6 FCC Rcd at 2976.

## III. GENERAL ISSUES

38. In this section, we discuss the two general issues raised in the Notice, the effects of price caps on consumer welfare and the economy, and whether the Commission should revise the overall goals of the LEC price cap plan to better serve the public interest.

### A. Effects of the LEC Price Cap Plan

#### 1. Background

39. In the Notice, the Commission summarized data gathered in monitoring LEC performance under the first three years of price caps.[27] For example, the Notice indicated that no price cap LECs had requested above-cap rates, and that LEC interstate access rates were $1.5 billion lower than rates existing at the time price caps were instituted. LEC returns, on the other hand, increased, from the target rate of return of 11.25 percent when LEC price caps took effect in January 1991 to an average of 12.25 percent in 1992.[28]

40. Monitoring data for the first three years of LEC price caps indicated that service quality under price caps was similar to levels under rate-of-return regulation. Residential customer service quality complaints, however, had increased during 1991 and had remained high through the first quarter[29] of 1993. The Notice observed that the major network service outages that occurred during the three-year period did not appear to be directly traceable to price cap regulation or to any strategy to maximize short-term profits by reducing maintenance expenses, but rather were mainly the result of fiber cable cuts caused by construction activity.[30]

41. We also observed in the Notice that the deployment of a technologically improved infrastructure appeared to accelerate under price caps, as price cap LECs increased the pace of digital switch upgrades, Integrated Services Digital Network (ISDN) lines, Signalling System 7 (SS7) capability, and fiber optic transmission facilities. In addition to services ordered by the Commission, such as Open Network Architecture and 800 Database,

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[27] Notice, 9 FCC Rcd at 1691.

[28] See id., and sources cited therein.

[29] Notice at 1691.

[30] The specific reasons behind these construction-related fiber cuts are currently being studied. Id.

the LECs introduced a range of new services under price cap regulation.[31]

42. Subscribership levels also improved during the initial price cap period, rising from 93.3 percent of households in 1990 to 94.2 percent in July of 1993.[32] The Notice pointed out, however, that the percentage of households subscribing to telephone service varies, inter alia, by state, the householder's race, family income, and in areas such as Indian reservations, highlighting the continuing issue of whether all Americans have an opportunity to use telephone service at affordable rates.[33]

43. In General Issue 2, the Commission sought further information on the effects of the price cap plan, including quantitative effects of the plan on consumer welfare, the economy, and the creation of jobs both in telecommunications and in other sectors of the economy. We sought data and analysis on how the plan would effect growth in telecommunications markets, revenues, profits by LECs and CAPs, competition in local exchange and access services, competition in interexchange services, and levels of demand for telecommunication services. We also requested similar analyses of the effects of possible revisions to the current plan.[34]

**2. Comments**

44. USTA states in its initial comments that as of 1993, on a compounded basis, consumers "gained over $2.9 billion through the price cap formula, plus an additional $564 million as a result of LEC pricing below the cap," compared to what consumers would have paid if the rates in effect at the onset of price caps had remained the same during that time period.[35] SWB claims that, by the end of 1994, the effects of the total price declines by price cap LECs will have accounted for over $5 billion in reduced customers' bills, using the same benchmark.[36] According to SWB, by the end of 1994, consumer benefits from LECs electing the 4.3 percent productivity offset will be approximately $250

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[31] These new services included electronic directory assistance, access to the Common Channel Signalling system, and upgraded fiber optic services. Notice, 9 FCC Rcd at 1691-92.

[32] Notice, 9 FCC Rcd at 1691.

[33] Id.

[34] Notice, 9 FCC Rcd at 1693 (General Issue 2).

[35] USTA Comments at 15 (footnote omitted).

[36] SWB Comments at 14.

million.[37] SWB states that LEC interstate switched access prices have declined by 13 percent under price cap regulation while output prices in the general economy rose by over 12 percent in the same period, for a decline of over 25 percent relative to inflation.[38]

45. Additional data requested by Commission staff was submitted by USTA on October 18, 1994 and updated on December 2, 1994, February 14 and 28, 1995 and on March 17, 1995. USTA provided data on the actual price indexes (APIs), PCIs, and rates of return for the price cap LECs, as well as rate impacts by year on price cap baskets, sharing amounts, low-end adjustment formula amounts, and exogenous costs. Selected data from the USTA submissions can be found in Appendix C, Table 6.

46. USTA's response to our data request shows that, compared to rates in effect immediately prior to initial price cap rates, rates in effect as of July 1994 were lower by about $2.12 billion on an annual basis. Of this amount, decreases due to the net effect of exogenous adjustments other than sharing and the lower formula adjustment mechanism are $996 million;[39] decreases due to below-cap pricing are $570 million; and decreases due to the net amount of sharing and the lower formula adjustment mechanism are $155 million. The remainder of the decreases, approximately $399 million, are due to the net effect of inflation, the productivity offsets actually selected, and the effect of traffic growth on the calculation of the carrier common line per minute rates.

47. Sprint also analyzed the revenue effects of price cap regulation. According to Sprint, the rate reduction from the beginning of price cap regulation through 1994 was $1.87 billion.

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[37] SWB Comments at 15. In the first year of price caps, 1991, only one major LEC, PacTel, elected the 4.3 per cent productivity factor. In later years the following LECs elected the higher productivity factor: BellSouth and US West in 1992; and US West, Rochester and PacTel (Nevada)in 1993 and 1994. Some United and Centel jurisdictions also elected the higher figure in various years. Four of the seven RBOCs and GTE have never elected the 4.3 per cent productivity factor.

[38] SWB Comments at 13-14.

[39] For the most part the decreases from the net effect of exogenous adjustments are the result of the subscriber plant factor, the amortization of inside wiring, NECA long-term and transitional support, the reserve deficiency allowance and the represcription of the rate of return from 12 to 11.25 per cent (see December 2, 1994 USTA response to data request, Table 12), events which are not likely to recur.

48. BellSouth asserts that the IXCs have not passed on the savings they have received from lower interstate exchange access charges to end-users. It claims that long distance rates, based on the average price per minute for basic service, as compiled by the Bureau of Labor Statistics (BLS), have increased since the inception of price cap regulation.[40] Customers for Access Rate Equity (CARE)[41] disputes BellSouth's assertion. It says that interstate long distance rates have fallen further under price caps than interstate exchange access rates have fallen.[42] It explains that the BLS figures do not reflect the pricing plans, discounts and promotions offered by the IXCs and widely purchased by their customers.[43] AT&T states that, because the long distance market is competitive, access cost reductions to long distance companies are passed along to consumers. It further points out that it is required by Section 61.44(b) of the Commission's Rules[44] to flow through access reductions to customers of its price cap regulated services.[45] Sprint also states that LEC access rate reductions have been passed on to its customers, the ultimate consumers.[46] In response, Bell Atlantic hired a market research firm which conducted a survey of 7431 end users, and found that about 30.8 percent of those end users used a discount plan.[47] AT&T replies that over 40 percent of its customers are on discount calling plans.[48]

49. MFS states that the LEC price cap plan has worked reasonably well in controlling the overall level of LEC prices

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[40] BellSouth December 8, 1994, ex parte filing; BellSouth January 20, 1995 ex parte filing; BellSouth February 10, 1995, ex parte filing; BellSouth March 23, 1995, ex parte filing.

[41] CARE is a coalition created to work for LEC price cap reform consisting of: Ad Hoc; API; AT&T; Consumer Federation of America; CompTel; ICA; MCI; National Association of State Utility Consumer Advocates; and Wiltel.

[42] CARE December 22, 1994, ex parte filing. See also MCI January 3, 1995, ex parte filing.

[43] CARE December 22, 1994, ex parte filing.

[44] 47 C.F.R. § 61.44(b).

[45] AT&T February 2, 1995, ex parte filing; AT&T February 3, 1995, ex parte filing.

[46] Sprint September 14, 1994, ex parte filing.

[47] Bell Atlantic March 23, 1995, ex parte filing.

[48] AT&T March 23, 1995, ex parte filing.

and earnings. MFS adds, however, that the price cap plan has been much less effective in regulating the LECs' rate structures, with the result that the benefits of incentive regulation have been very unevenly distributed.[49] AT&T notes that we stated in the Notice that LEC price caps has resulted in interstate access rates $1.5 billion lower than at the inception of the LEC price cap plan, but argues that the full potential benefit to the economy will not be realized unless price cap regulation reduces interstate access charges to more competitive levels.[50] In contrast to these arguments, WilTel and CCTA contend that price cap regulation has not resulted in lower prices, or improved consumer welfare or economic development, compared to what would have occurred in a rate-of-return environment.[51] CCTA cites LEC comments that attribute a significant portion of rate reductions to competitive forces and prevailing economic conditions in support of its position that any rate reductions are not attributable to the institution of price cap regulation.[52] Wiltel bases its claim on interest rate declines that were not captured by the price cap system and the declining costs experienced due to new technology, both of which the Commission could have required the LECs to flow through to customers under rate-of-return regulation.[53]

50. Ad Hoc, a coalition of local exchange access users, claims that it is impossible to show that there has been a direct and causal link between telecommunications investment and economic growth, based on a submitted analysis by Economics and Technology, Inc. (ETI).[54] Pac Bell asserts that ETI's analyses do not support Ad Hoc's claim because inter alia they are based on models that are outdated and that inappropriately combine various types of telecommunications investment.[55] SWB asserts that ETI's study overstates LEC total factor productivity, and that ETI bases its study on an unreasonably small sample of study areas.[56]

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[49] MFS Comments at 2.

[50] AT&T Comments at i, 4, citing Notice, 9 FCC Rcd at 1691.

[51] WilTel Comments at 5; CCTA Reply at 9.

[52] CCTA Reply at 8-9.

[53] Wiltel Comments at 5-6.

[54] Ad Hoc Comments at 6-10 and Attachment A.

[55] Pac Bell Reply at 6-7.

[56] SWB Reply at 42-44.

51. MCI believes that price cap regulation will deliver the maximum benefits to the economy only if it requires LECs to move prices toward economic cost. MCI asserts that, because the Commission was conservative in its selection of a productivity factor, the LECs priced services at artificially high levels, thereby depressing the effects lower rates would have had on the economy.[57]

52. USTA commissioned the WEFA Group (WEFA) to conduct a study of price cap regulation.[58] USTA says that, according to the WEFA study, adoption of USTA's proposed revisions to the price cap plan[59] would produce 500,000 jobs, GDP would be $60.5 billion higher by 2004, inflation would be 0.15 percent lower each year, the balance of trade would improve by a cumulative $16 billion over ten years, and the federal budget deficit would be lower by a cumulative $149 billion over ten years, compared to continuation of the current price cap plan.[60] Ad Hoc and MCI interpret WEFA's study as an unsupported promise that LECs would increase investment if rates were increased.[61] Ad Hoc also claims the WEFA study improperly assumes that all network investment would be equally productive, and fails to discuss the effect on the economy if the funds used for incremental investments had instead been used to lower rates.[62]

53. With regard to infrastructure improvement, SWB states that, during the first three years under price caps, the price cap LECs invested approximately $60 billion in property, plant, and equipment.[63] US West reports that it has decreased prices approximately $310 million under price caps; that it has invested $6.7 billion in infrastructure, an average increase of more than

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[57] MCI Comments at 10.

[58] USTA Comments, Attachment 7.

[59] The USTA proposal originally recommended, among other things, a three-tier regulatory system, which would create Initial Market Areas (IMAs), Transitional Market Areas (TMAs), and Competitive Market Areas (CMAs) for each LEC, and apply different regulations to each type of area. USTA Comments at 58-66. USTA has revised its recommendation on several occasions since it filed its comments. The various versions of the USTA proposal are discussed in detail below.

[60] USTA Comments at 97.

[61] Ad Hoc Reply at 6; MCI Reply at 11-12.

[62] Ad Hoc Reply at 5-6.

[63] SWB Comments at 16.

12 percent from 1990's capital expenditures; and that it has spent $0.8 billion upgrading 534 offices with digital switches and providing one-party service in rural areas.[64] US West says that it had a 103 percent increase in fiber sheath kilometers from 1989-1992.[65] NYNEX states that the number of strand miles of fiber in its network doubled during the first three years of price caps. GTE states that, between 1989 and the end of 1993, the total sheath kilometers of fiber in its network increased 84.67 percent.[66] Ameritech asserts that, under price caps, its total fiber miles have more than tripled.[67] Pac Bell states that its deployment rate for fiber under price cap regulation has equaled or exceeded its fiber deployment before price cap regulation and that, over the same period, the deployment of copper gradually diminished.[68] BellSouth notes that it has added approximately 511,000 fiber miles for a total of over 1.1 million miles.[69]

54. Pac Bell states that under price caps, it began deployment of High Bit Rate Digital Subscriber Line (HDSL) service. Pac Bell states that ten percent of Nevada Bell's high-capacity circuits to end users are on HDSL.[70] GTE says that, since 1989, it has deployed 1,819 digital switches.[71] Ameritech asserts that, under price caps, the percent of customers served by digital lines has doubled.[72] GTE, Ameritech and BellSouth each state that it has increased significantly the number of switches equipped with ISDN capabilities and interLATA and intraLATA SS7 functionality.[73]

55. USTA's response to our data request states that ARMIS

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[64] US West Comments at 3.

[65] US West Comments at 29.

[66] GTE Comments at 15.

[67] Ameritech Comments at 7.

[68] Pac Bell Comments at 23.

[69] BellSouth Comments at 17.

[70] Pac Bell Comments at 23.

[71] GTE Comments at 15-16.

[72] Ameritech Comments at 7.

[73] GTE Comments at 15-16; Ameritech Comments at 7; BellSouth Comments at 17.

4307 reports[74] show that price cap LECs have increased digital control program switches from 64 percent at the end of 1990 to more than 81 percent at the end of 1993; the percent of access lines equipped with access to inter-LATA SS7 functionality has increased from .03 percent to more than 74 percent in that same time period; and that price cap LECs have increased the percent of access lines equipped with access to intra-LATA SS7 functionality from less than 18 percent at the end of 1990 to more than 78 percent at the end of 1993.[75]

56. BellSouth states that since price caps was implemented, Bell operating companies have invested 52 percent of their cash flow from local telephone operations in network facilities versus 48 percent during the 1988-1990 time frame.[76]

57. As to introduction of new services, SWB claims that the "restrictive regulatory environment" inhibits introduction of new services. Nonetheless, it states that it has offered about 50 new services since the inception of price cap regulation. Of these services, ten are related to Open Network Architecture (ONA), 32 non-ONA new services are effective and the rest have been denied or were pending as of the time of the comments.[77]

58. USTA's response to our data request shows that price cap LECs have made at least 478 new service filings since the advent of price caps. In addition, they have made at least 158 restructured services filings.

**3. Analysis**

59. We have reviewed the data submitted by the parties and described above. In general, we find that the submissions of USTA and Sprint are reasonably accurate,[78] and that they provide substantial evidence that rates have declined significantly under price cap regulation compared to the rates in effect at the start of price cap regulation.

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[74] ARMIS is a database containing detailed investment and expense information reported by LECs on a regular basis.

[75] See Appendix C, Tables 1 through 3.

[76] BellSouth February 10, 1995, ex parte filing.

[77] SWB Comments at 16.

[78] Because Sprint relies on the October 18, 1994 data submission of USTA, its figures do not reflect USTA's December 1994 update and the February and March 1995 updates. The difference in Sprint's total and USTA's total appears to result from the difference in the data used.

60. The full benefits to consumers consist, however, of more than just the amount by which rates in 1994 were lower than rates in effect immediately prior to the initiation of price caps. The full benefits are cumulative, i.e., the sum of the annual amounts by which rates in each year of the price cap review period (1991 - 1994) were below the rates in effect immediately prior to the initiation of price caps. Compared to rates in effect immediately prior to initial price cap rates, USTA's data submission shows the cumulative savings have been approximately $5.9 billion. Of this amount, cumulative savings due to exogenous cost adjustments were $4.03 billion; cumulative savings due to below-cap filings were $1.14 billion; and the cumulative net amount of sharing and the lower formula adjustment mechanism was $0.152 billion. The cumulative changes due to the net effect of inflation, productivity factors actually selected, and the effect of traffic growth on the calculation of the carrier common line per minute rates accounts for approximately $593 million.[79]

61. We also conclude that the IXCs have passed on the savings they have received from lower interstate exchange access charges to end-users. The AT&T price cap plan requires AT&T to treat changes in the access charge rates it pays to LECs as exogenous and pass through any savings from reductions in those charges to residential service basket customers.[80] This may be accomplished through the use of optional calling plans, promotions and discounts from the basic rates. Our recent performance review of the AT&T price cap plan indicated that AT&T has passed on these cost reductions to its customers.[81] Although basic rates have remained relatively high, AT&T has passed on its savings from lower access charges in the form of optional calling plans and other discounts and promotions.[82] We also have no reason to believe that AT&T's long distance competitors have not been forced by competition to follow suit. Thus, although the data BellSouth offered to show that basic long distance rates have not decreased may be correct, that data fails to capture the effect of optional calling plans and other discounts.

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[79] In those years in which GNP-PI exceeded the productivity factor the net effect was an increase in prices; in those years in which GNP-PI was lower than the productivity factor, the net effect was a decrease in prices.

[80] 47 C.F.R. § 61.44(b).

[81] Price Cap Performance Review For AT&T, CC Docket No. 92-134, 8 FCC Rcd 6968, 6970-71 (1993).

[82] Id., at 6970-72, 6975 (1993).

62. We have reviewed the Service Quality Report,[83] Fiber Deployment Update,[84] and the Subscribership Report,[85] released by our Industry Analysis Division since we adopted the Notice in January 1994. In general, those reports show no significant changes in the trends discussed in the Notice and summarized above. Specifically, measures of service quality and customer complaints have in most cases not changed dramatically as of the third quarter of 1993,[86] although in at least one case the data show a fairly large increase in customer complaints. Specifically, the reported percentage of residential customers in NYNEX's region satisfied with their telephone service declined from 92.1 percent in the second half of 1992 to 85.1 percent in the first half of 1993.[87] LEC fiber deployment grew by about 27 percent in 1993, compared with 31 percent in 1992.[88] Between the time of the Notice and July 1994, telephone subscribership declined slightly, from 94.2 percent to 93.7 percent.[89]

63. Reports filed with the Commission show that the Bell operating companies increased the amount spent on investments in new plant by about 4.5 percent during the first three years of price caps, compared to the 1988-1990 time frame.[90] As a percentage of depreciation, RBOC investment in new plant increased by approximately 4.2 percent under price caps as

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[83] Quality of Service for the Local Operating Companies Aggregated to the Holding Company Level, Jonathan M. Kraushaar, Industry Analysis Division, March 1994 (Service Quality Report).

[84] Fiber Deployment Update, End of Year 1993, Jonathan M. Kraushaar, Industry Analysis Division, May 1994 (Fiber Deployment Update).

[85] Telephone Subscribership in the United States (Data Through July 1994), Alexander Belinfante, Industry Analysis Division, November 1994 (Subscribership Report).

[86] Service Quality Report.

[87] Service Quality Report, Table 1. Small business customer satisfaction declined from 91.5 percent to 85.1 percent during this period. The Report noted that several carriers have revised their customer perception surveys, which might cause apparent fluctuations in data, but stated that the downward trend for NYNEX "probably has other causes." Service Quality Report at 4.

[88] Fiber Deployment Update.

[89] Subscribership Report.

[90] See Appendix C, Table 4, compiled from Statistics of Communications Common Carriers.

compared to 1988-1990; and, as a percentage of total employee compensation, investment in new plant increased by about 1.4 percent during those same time periods.[91] Although the implementation of price caps apparently did not inspire a major increase in network investment, RBOC infrastructure investment did grow under price caps. This indicates that implementation of price caps has not discouraged investment in new facilities or led to diminished investment in network modernization.

## B. Policy Goals and Directions for LEC Price Caps

### 1. Introduction

64. This Commission has long sought to encourage full and fair competition in communications markets, in the conviction that competition can be expected to carry out the purposes of the Communications Act more assuredly than regulation. In light of this conviction, we adopted the current price cap system which, we believed, was not only superior to rate-of-return regulation, but could also act as a transitional system as LEC regulated services became subject to greater competition. As competition has taken effect in various markets, we have been able to shift to more lightly regulated regimes. In the case of AT&T, for example, price caps proved to be a transitional form of regulation for many services, which were moved from price caps into streamlined regulation as competition for these services increased.[92] While the LECs apparently retained significant market power under price caps, we similarly allowed them increased pricing flexibility as conditions for increased competition in local transport were met. We also anticipated that this fourth year review of LEC performance under price caps would provide a forum to consider other reforms, consistent with the idea of regulating only where and to the extent that competition remained absent in the marketplace.

65. In the Notice, we solicited comment on whether the policy goals and directions we have set for the LEC price cap plan should be changed. These goals include rates that are just, reasonable, and nondiscriminatory. They also include the goal of fostering a communications system that offers high quality services. Recognizing the dynamic nature of technological change in telecommunications, we also seek to encourage the deployment of new, innovative services. The current price cap plan seeks to achieve these goals by replicating many of the incentives of a

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[91] Id.

[92] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991), modified on recon., 7 FCC Rcd 2677 (1992).

competitive market, and thus encouraging price cap LECs to make economic decisions similar to those they would make in a fully competitive market. Where market forces might not best serve the public interest and the goals of the Communications Act, however, other policies may be necessary. For example, we reaffirmed our commitment to the range of programs, such as the Universal Service Fund, Link Up America, and Lifeline Assistance, that promote affordable telephone service throughout the United States.[93]

66. We expressed our belief that these basic goals of price caps remain valid. We sought to examine whether the price cap plan furthers the development of the telecommunications infrastructure and services that will be needed in the years ahead. Based on such considerations, we framed General Issue 1 to seek comment on whether and how the goals of the LEC price cap plan should be revised to better serve the purposes of the Communications Act and the public interest in the years ahead.[94]

**2. Comments**

**a. The Policy Direction of Replicating Competitive Markets**

67. In their comments, parties with otherwise differing views and recommendations uniformly support the policy of fashioning price caps to reproduce, to the extent possible, the effects of competition.[95] An economic analysis submitted by USTA on behalf of the price cap LECs states, for instance:

> Our starting point is the view that (with few exceptions) the competitive process leads to good economic outcomes: just and reasonable prices, suitable levels of service quality, an appropriate return on investment, an efficient use of scarce resources, the proper rate of technical progress, and an adequate incentive to implement and market new products and services. Thus, regulation should foster a competitive outcome in those markets where competition has

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[93] Notice, 8 FCC Rcd at 1692.

[94] Id. at 1693.

[95] SNET, NYNEX, OCCO, GSA, AT&T, Ameritech, MFS, Pac Bell, Time Warner, and API state in general that the basic goals of price caps remain valid and should not be revised. SNET Comments at 7; NYNEX Comments at 3; OCCO Comments at 4; GSA Comments at 4; AT&T Comments at 4; Ameritech Comments at 3; MFS Comments at 5-6; Pac Bell Comments at 7; Time Warner Reply at 7-9, and API Reply at 3.

yet to develop.[96]

LECs urge that the Commission substitute competition for regulation where possible[97] and apply market-driven pricing where regulation is necessary.[98] The LECs also urge the Commission not to adopt policies that reduce the technical efficiency that competitive markets can be expected to generate.[99]

68. Long distance carriers addressing the issue also voice their support for competition and, in its absence, policies that replicate the results of competition. MCI cites the success of competition in the long distance and customer premises equipment markets in benefitting customers through innovation, high quality services, and reduced rates.[100] WilTel similarly reasons that "[c]ompetitive markets, with open access to all customers for all service providers, will provide the best path to economic growth and widespread access to a diversity of information sources and other services, including health and educational services."[101]

69. Comments representing the views of customers also strongly support the competitive market as a model and goal of regulatory policy. An economic study submitted by Ad Hoc asserts:

> The central goal of economic regulation is to achieve a "competitive result" in industries and markets in which some degree of "market failure" precludes this outcome from occurring on its own . . . . The bedrock "competitive

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[96] National Economic Research Associates, Inc., "Economic Performance of the LEC Price Cap Plan," USTA Comments, Attachment 5 at 1.

[97] Harris, "Benefits of LEC Price Cap Reform," USTA Comments, Attachment 2 at 16.

[98] Id. ("For competition policy to work well, pricing should be market-driven with only limited, targeted exceptions. Competition policies should recognize when, and the degree to which prices are not market-driven. In the best case, prices are regulated only when competition or customer discretion is inadequate to protect buyers from the exercise of market power.").

[99] See e.g., "Regulatory Reform for Local Exchange Carriers: Competition Through Regulatory Symmetry," Statement of Dr. Mark Schankerman, May 1994, GTE Comments, Attachment A at 3-4.

[100] MCI Comments at 7-8.

[101] WilTel Comments at 8.

result" objective of economic regulation is not -- and should not be -- modified or diminished under price cap or other forms of incentive regulation, *and proposals for revision of the basic FCC price cap system should in all cases be evaluated with respect to their consistency with the fundamental "competitive result" goal.*[102]

**b. Changes Proposed in the Current Plan to Replicate Competitive Markets More Accurately**

70. The commenters on the policy goal of replicating competition differ in their identification of specific features of the current price cap plan that do not, in their view, accurately reproduce the results of competitive markets. As we discuss in more detail in later sections of this First Report and Order, the LECs contend that the current plan falls short of the competitive ideal primarily because it includes features of rate of return-based regulation. USTA identifies four main flaws in the current price cap plan:

> First, the low-end adjustment leaves customers at risk, since they 'share' in any underearnings. Second, sharing [of high-end earnings] limits the incentives for efficiency, innovation, and good performance; in competitive industries, firms that perform above industry averages earn above the industry average profit; firms that perform below average earn less. Third, sharing plans are more costly and complex to administer, because they require both an apparatus for price indexing and for regulating the rate of return. Fourth, the regulator can no longer honor its half of the rate of return contract: given the degree to which competition will develop, the Commission cannot realistically commit itself to assuring LECs the opportunity to earn a given rate of return over the life of their current investments.[103]

71. USTA proposes that the Commission remedy these flaws by adopting pure price cap regulation. In addition, it recommends policy changes such as ending the prescription of depreciation rates, streamlining the regulations for new services, and establishing regulatory parity for LECs, CAPs, IXCs, and other service providers. USTA argues that these changes, taken together, will create substantially greater incentives for

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[102] Selwyn et al., "LEC Price Cap Regulation: Fixing the Problems and Fulfilling the Promise," submitted with Ad Hoc Comments, Attachment A at 7, 9 (emphasis in original).

[103] Harris, "Executive Summary of USTA's Expert Reports on LEC Price Cap Reform," USTA Comments, Attachment 1 at 5.

efficiency and innovation, similar to those in competitive markets. A LEC study estimates that the current LEC price cap plan provides less than 35 percent of the efficiency incentives that exist under unregulated competition, and that marginal efficiency incentives in the plan are only about 18 percent for a LEC whose earnings are in the sharing zone each year.[104] As we discussed above, USTA estimates that its pure price cap plan would, over time, stimulate economic growth, create additional jobs, lower inflation, and produce savings to consumers, in addition to other benefits.[105]

72. IXCs and other LEC customers contend, however, that to replicate competition more accurately the current plan should be revised to increase the benefits of the plan to customers. For example, AT&T agrees with the Commission's comments in the Notice that the LECs' average profitability has increased under price caps and the Notice's further observation that this may provide "a good case" for revising the productivity factor upward.[106]

73. MCI states that the price cap plan does not require fundamental revision, but that the Commission must revise key parameters of the plan, such as the X-Factor, with the goal of achieving a more equitable allocation of benefits between LEC ratepayers and LEC shareholders. It points to increases in LEC earnings, declines in their costs of capital, and exogenous cost increases as generating benefits to shareholders that eclipsed ratepayer benefits by $900 million. In MCI's view, the key parameters of the original price cap plan, especially the X-Factor, turned the plan into a "no lose" proposition for the LECs, not one that fairly shared the benefits of price cap regulation. MCI urges the Commission to modify the plan to constrain LEC prices to reflect costs more accurately, to maximize the economic welfare obtainable through price caps, and to avoid incorrect pricing that would send distorting signals to the many sectors of the economy where telecommunications is a key input.[107] The General Services Administration (GSA) believes that current price cap rates are not just and reasonable, and that lower rates would benefit the economy, create jobs, and promote universal service, while allowing infrastructure development, competition and open access to be implemented in an economically efficient manner to the ultimate benefit of all

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[104] Strategic Policy Research, "Regulatory Reform for the Information Age," NYNEX Comments, Attachment F at 47.

[105] Section III.A.2, supra.

[106] AT&T Comments at 21-22.

[107] MCI Comments at 2-5, 10-11.

consumers.[108]

74. ICA also asserts that the initial price cap plan was too generous to the LECs. ICA states that the Commission's first mandate is to protect ratepayers and to prevent LECs from unduly exercising market power, and urges that "the LECs' price cap be reset so as to ensure that LEC earnings are no higher than returns realized in the overall competitive capital market."[109] Not to do so, ICA maintains, "would perpetuate the large share of excess earnings that LECs have achieved by means of an overly-generous regulatory system, rather than becoming more efficient."[110] ICA also expresses concerns that rates above competitive levels could distort the organization of the U.S. telecommunications and information industries. "Excess prices for communications services will lead to the dominant LECs realizing ever-higher margins, and the resulting cash flow could be diverted to internally financed strategic investments that should be funded separately through public securities markets. If LEC cash flow is directed toward investments in competitive or foreign markets, replacing financing that should be raised in competitive capital markets, the result may simply be their unwarranted dominance over vital new sectors of America's high technology industries."[111]

75. Ad Hoc strongly recommends that the Commission adhere to the principle that the goal of price cap regulation is to achieve as closely as possible the "competitive result," i.e., the price and earnings levels and efficient resource allocations that would be expected to occur in fully competitive markets, in interstate access markets where the LECs retain substantial market power.[112] Its accompanying economic study, prepared by Economics and Technology, Inc. (ETI), asserts that the reality of the current price cap plan falls far short of providing the level of discipline imposed by competition. As the study explains, in competitive industries price levels are set by the marketplace, influenced by input prices, technology, and demand and supply conditions. While individual firms have incentives to reduce costs and improve efficiency in order to generate greater profits, these gains are transitory. In time, the sources of

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[108] GSA Comments at 4.

[109] ICA Comments at 4.

[110] Id. at 4.

[111] Id. at 6.

[112] Selwyn et al., "LEC Price Cap Regulation: Fixing the Problems and Fulfilling the Promise," Ad Hoc Comments, Attachment A at 2.

these efficiency gains, such as new production techniques and technologies, are mimicked by rivals, so that profit gains frequently will be short-lived. "There is no expectation in a competitive market that an efficiency gain on the part of an individual firm will create a *permanent* increase in profits."[113]

76. Thus, Ad Hoc argues, benefits of LEC efficiency gains must not be permanently institutionalized, but rather should be treated as temporary and flowed through to customers over time in the same way that a competitive marketplace recognizes the fluid nature of markets and industries.[114] The ETI study concludes that the price cap plan should be revised to: (1) accommodate periodic changes in industry productivity; (2) reflect accurately actual changes in LEC input costs; (3) simulate the diffusion of efficiency gains in competitive markets through the sharing requirement; (4) reflect fundamental changes in prevailing costs of money so that the same types of capital market conditions would exist as for firms in competitive industries; and (5) maintain effective safeguards to prevent "gaming" of the price cap sharing mechanism.[115]

77. While not disputing the Ad Hoc/ETI description of how competitive markets flow productivity gains through to customers[116] and Ad Hoc/ETI's conclusion that profit gains are transitory, the LECs raise several problems with their view:

> First, technological or process innovation requires a long period of time to diffuse throughout a company or network, so that even in competitive markets, the duration of gains or losses from productivity growth can be quite long. Second, while competitive advantage in rivalrous markets is transitory, there is no automatic link between higher productivity growth of one firm and higher productivity growth of the industry

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[113] Id. at 10 (emphasis in original).

[114] Id. at 3, 9-10.

[115] Id. at 10.

[116] But see SWB Reply at 34 (citing no authority and giving no explanation, SWB claims that "[i]n a competitive market, all firms are able to retain the benefits of increased efficiency."); see also SWB Comments on USTA January 18 Letter at 7-8 (SWB contends that in nonregulated competitive markets, firms are encouraged to "build a better mouse trap" by the increased returns that such an innovation provides; SWB asserts that over time, "other firms attempt to match the results of an innovator and eventually 'compete away' the lasting benefits to the innovating firm.")

> average. If a firm can beat the industry average [total factor productivity] growth every year, it will experience above-normal earnings every year, and -- most important -- a rise in its measured regulatory accounting earnings will not trigger any force that will lower its earnings in the future. In competitive markets, there is no incentive to withhold productivity gains from the market for fear that they will engender a productivity penalty in the future.[117]

**c. Infrastructure Development Goals**

78. Some LECs recommend that the goals of price caps be expanded to include stimulation of infrastructure development. Among the expanded goals recommended by USTA, and supported by BellSouth, SWB, GTE, and RTC, is the goal of developing the National Information Infrastructure (NII).[118]

79. ICA asserts that it would be wrong to attenuate further the plan's ratepayer protection features in favor of a "supply-side" economic policy designed to encourage or to extend universal service to telecommunications capabilities that many consumers may not want.[119] Time Warner asserts that embedding special treatment for LEC investment would only sustain the LECs' dominance.[120]

80. Some of the commenters recommend that the Commission increase incentives for LEC investment in the NII by: (1) eliminating or revising the sharing and low-end adjustment mechanisms; (2) eliminating or revising the depreciation prescription; (3) revising the new services rules; (4) decreasing the base productivity factor; and (5) providing regulatory symmetry and pricing flexibility.[121] BellSouth asserts that,

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[117] USTA Reply, Attachment 4 at 33.

[118] USTA Comments at 3-4; BellSouth Comments at 13; SWB Comments at 67; GTE Comments at 38; RTC Comments at iii, 4.

[119] ICA Comments at 4.

[120] Time Warner Reply at 8. See also MCI Reply at 10.

[121] Ameritech Comments at 6-7; Pac Bell Comments at 9; CCIA Comments at 6-13; CCIA Reply at 3 (stating that deregulating LEC depreciation rates would stimulate more LEC investment in regulated local network plant and thus promote completion of the NII); id. at 11 (stating that "[t]he Commission can neither accurately predict nor establish the time of economic obsolescence under competitive conditions"); BellSouth Comments at 18; SNET Comments at 9 (stating that improved capital recovery

because the LEC price cap plan places constraints on the level of LEC earnings, the plan provides far less incentive for LECs to reinvest in price cap services relative to other, less regulated lines of business that offer the potential for greater returns.[122] Time Warner suggests that the LECs as well as their competitors should contribute to the development of a NII.[123] ARI recommends that the Commission require that a reasonable portion of any increased LEC earnings from price caps be invested in the network.[124]

81. CCIA, ALA, NADO, and the Council of Schools recommend that the Commission offer LECs more favorable treatment under price cap regulation (including relief from sharing obligations, depreciation requirements, and the baseline productivity factor) to encourage the LECs to connect public facilities such as schools and libraries to the NII.[125] The Educational Organizations suggest that the price cap LECs be given the option of allocating the 0.5 percent consumer productivity dividend (CPD) to a special account against which the LECs would charge investments made in educational and library infrastructure in their telephone service territories.[126] Bell Atlantic suggests that the Commission adopt an optional lower productivity offset that the LECs could elect in exchange for devoting additional revenues they receive as a result of choosing the option to targeted, Commission-approved purposes.[127]

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mechanisms, increased pricing flexibility, and streamlined filing and cost support procedures would promote investment in the infrastructure); Lincoln Reply at 2-3; NTI Reply at 6-15; US West Comments at 41; BroadBand Comments at 5; GTE Reply at 95-101; see also Sprint Comments at 5 (recommending elimination of the sharing mechanism); Eagle Comments at 1-3 (stating that elimination of the cap on LEC profitability will stimulate growth in telecommunications manufacturing and will speed the modernization of telephone network infrastructure); Senior Comments at 1.

[122] BellSouth Comments at 18.

[123] Time Warner Comments at 3.

[124] ARI Comments at 4-5.

[125] CCIA Comments at 3, 15; ALA Comments at 2; The Council of Schools Comments at 3; NADO Reply at 6-7.

[126] Educational Organizations Reply at 8; AASA Reply at 1; see also NADO Reply at 7.

[127] Bell Atlantic Reply at 18.

82. In a February 22, 1995 ex parte filing, USTA proposes that LECs make a voluntary contribution of an amount equal to one percent of the LEC's annual interstate revenues into an education fund every year for three years.[128] The education fund, which would be available to K-12 schools and libraries, would "phase out" at the end of three years.[129] The funds would be available for interconnection to the NII or to further develop their NII capabilities.[130] Under the proposal, the Commission would create and oversee the operation of a board to administer the fund on a "technology neutral and competitively neutral basis."[131] USTA maintains that its proposal avoids many of the controversies generated by the other education proposals submitted in this docket because "[f]unding would be made out of stockholder equity"[132] and thus "it would be completely outside of the FCC's price cap mechanisms."[133]

83. ICA asserts that, if the Commission revises the LEC price cap plan to accelerate NII development (which ICA opposes), then any additional infrastructure funding should be limited to developing modernized information resources in public institutions and should be subject to matching funds from non-ratepayer sources.[134] ICA maintains that any such funding mechanism should remain exogenous to the LEC price cap plan and should be subject to prior Commission approval. ICA suggests that the funding from the rates of regulated LECs should be limited to $20 million per year for each carrier or holding

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[128] Ex parte letter from Roy M. Neel, President and Chief Executive Officer of USTA to Reed E. Hundt, Chairman of the FCC, at 1-2, Attachment at 1 (dated Feb. 22, 1995) (USTA Feb. 22 Letter).

[129] USTA Feb. 22 Letter, Attachment at 1; see also USTA Feb. 22 Letter, Attachment at 1. (asserting that assuming all of the price cap LECs participate, the fund might initially be established at $200 million, and grow to a total of $600 million over the three-year period).

[130] USTA Feb. 22 Letter at 2.

[131] USTA Feb. 22 Letter, Attachment at 2; see also USTA Feb. 22 Letter at 2 (USTA's proposal would allow schools and libraries to make purchases from any firm subject to the Commission's jurisdiction and would not require the use of any particular technology or service provider).

[132] USTA Feb. 22 Letter, Attachment at 1.

[133] USTA Feb. 22 Letter at 2.

[134] ICA Comments at 7-8.

company. In addition, ICA recommends that only projects that have been subject to full competitive procurement rules should be eligible for ratepayer supplied infrastructure funds.[135]

84. Many commenters oppose modifications to the LEC price cap plan to accelerate development of the NII.[136] ICA says that regulatory awards of higher earnings, higher price cap ceilings, higher depreciation, and other sources of increased cash flow do not generally translate into greater LEC investment in the network.[137] CCTA avers that reducing the productivity factor to encourage LEC investment in the infrastructure would be tantamount to requiring ratepayers to provide the funding and to bear the risk of that investment. CCTA maintains that such an approach to increased infrastructure investment is contrary to the objectives of price cap regulation.[138] Ad Hoc, Time Warner, and TCG assert that modifications to the plan to stimulate investment in the infrastructure would ensure that the LECs continued to monopolize the local exchange and exchange access markets. They assert that marketplace forces should define the parameters of the NII and that the Commission can most effectively assist in the development of a ubiquitous NII by promoting competition in the local infrastructure.[139] MCI, API,

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[135] ICA Comments at 7-8.

[136] Ad Hoc Comments at 11; TCG Comments at 6; OCCO Comments at 6; WilTel Reply at 16; Time Warner Reply at 7-8; PaOCA Comments at 8; API Reply at 7; Hyperion Reply at 9; Cox Reply at 9; ICA Reply at 15; MCI Comments at 11-13.

[137] ICA Reply at 18; see also WilTel Reply at 15 (asserting that there is no connection between pricing flexibility and infrastructure investment); ICA Comments, Attachment A at 2 (stating that on average, for the last seven years, the RBOCs have internally generated $90 million per month that was not re-invested in their networks and, therefore, capital formation is not a problem in the LEC industry); Cox Reply at 9 (stating that most large LECs already have announced plans to spend billions of dollars upgrading their facilities to provide video dialtone and other new services).

[138] CCTA Reply at 25; see also PaOCA Comments at 8-9 (maintaining that LECs should bear the risks involved in deploying new endeavors).

[139] Ad Hoc Comments at 11-12; ICA Reply at 15; TCG Comments at 6-7; WilTel Reply at 15; Cox Reply at 9; Ameritech Reply at 4; ICA Comments at 7 (stating that increased competition would provide a more efficient mechanism for transferring new technologies into the economy than would an explicit infrastructure element in the price cap plan).

and Wiltel recommend that the Commission encourage broader-based network investment by adopting policies that require the unbundling of access services, encourage cost-based pricing, and ensure nondiscriminatory access to the LEC networks.[140]

**d. Other Goals**

85. USTA, BellSouth, SWB, GTE, and RTC recommend that price cap goals be expanded to include: (1) promotion of universal service; (2) stimulation of new service development; (3) stimulation of economic growth by reducing production costs and inducing customers to make greater use of telecommunications services; (4) promotion of balanced competition in access markets; (5) promotion of the efficient use of the network by ensuring that decisions made by all carriers and their customers approximate decisions made under competitive market conditions; and (6) prohibition of unreasonable discrimination.[141]

86. USTA's comments on behalf of the LECs also assert that changes in industry conditions have two crucial implications for policy goals. First, to reflect the growing importance of telecommunications to national economic welfare, USTA urges that added weight be given to economic efficiency, competition, and economic development effects. Second, it claims that policy makers should take full account of the dynamics of change in telecommunications, on both supply and demand sides. It proposes a set of principles to guide price cap reforms accordingly: substitute competition for regulation, promote competitive neutrality, facilitate market responsiveness, synchronize regulatory and competition policies, make price caps more adaptive and flexible, and shift the risks of network investments from ratepayers to shareholders.[142]

87. US West opposes expansion of the price cap goals to advance any particular social agenda, including increasing employment or improving education. US West argues that attainment of such social goals will be the result of a more efficient price cap plan.[143] MCI opposes expanding the goals to include promoting universal service or encouraging the development of the NII because these issues affect the entire

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[140] MCI Comments at 13; API Reply at 8; WilTel Comments at 16.

[141] USTA Comments at 3-4; BellSouth Comments at 13; SWB Comments at 67; GTE Comments at 38; RTC Comments at iii, 4.

[142] USTA Comments, Attachment A at 4-5, and Attachment 2 at 13-18.

[143] US West Comments at 4, 22.

industry while price caps applies only to the LECs. MCI says that some of the other goals proposed by USTA and BellSouth (including stimulating economic growth) already are subsumed in the existing goals. MCI adds that the proposed goals for economic growth and job creation are not listed as responsibilities of the Commission in the Communications Act, which does require the Commission to ensure just, reasonable, and nondiscriminatory rates in Sections 201 and 202.[144]

88. MFS recommends that the Commission put greater emphasis on the goal of ensuring nondiscriminatory rates.[145] TCG recommends that the goals be expanded to include promotion of local telecommunications competition.[146]

89. MCI believes that the goals should be augmented to include promoting the development of competition in the interstate access market.[147] WilTel recommends expanding the goals to include both "the promotion of diverse competition in all telecommunications markets and the guarantee of open, nondiscriminatory access paths between all end user customers and all competing suppliers of services."[148]

### 3. Analysis

#### a. Purposes of the Communications Act

90. The goals of the LEC price cap plan ultimately spring from the Communications Act, including the broad purpose "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges,"[149] as well as from the specific provisions of Title II of the Act directing that rates and regulations be just and reasonable,[150] and not unreasonably discriminatory.[151]

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[144] MCI Reply at 10.

[145] MFS Comments at 4-6.

[146] TCG Comments at 4.

[147] MCI Comments at 7-8. MCI notes that, at the time of the original adoption of the price cap plan, the FCC had not formally authorized competition for interstate access services. Id. at 8.

[148] WilTel Comments at 7.

[149] Section 1 of the Communications Act, 47 U.S.C. §151.

[150] Section 201(b) of the Communications Act, 47 U.S.C. §201(b).

91. Both economic theory and our own experience support the views of many commenters in this docket that these purposes generally are best accomplished by actual competition or, where this does not exist or is not fully effective, by policies that replicate the effects of competition to the extent possible. Effective competition encourages firms to improve their productivity and introduce improved products and services, in order to increase their profits. With prices set by marketplace forces, the more efficient firms will earn above-average profits, while less efficient firms will earn lower profits, or cease operating. Over time, the benefits of competition flow to customers and to society, in the form of prices that reflect costs, maximize social welfare, and efficiently allocate resources.

**b. Policy Goals for LEC Price Caps**

92. In the case of the LECs' interstate services, the optimal form of regulation would largely replicate the competitive outcome. Because the LECs appear to retain substantial market power in providing local exchange and access services, regulation continues to be needed to achieve the goals of the Communications Act, and to increase consumer welfare. The current LEC price cap plan represents, in large part, a program of improving consumer welfare by introducing profit incentives and price constraints that more closely replicate the operation of competition than traditional, rate-of-return regulation. Our goal and expectation were that, by easing restrictions on profits while setting price ceilings at a challenging but reasonable level, the LECs would have the incentive to become more efficient and innovative at the same time that customers benefitted from lower rates.

93. In considering possible revisions to the LEC price cap plan, our primary goal will be to maximize the benefits of the plan to consumers and society, in accordance with the purposes and requirements of the Communications Act. This goal generally will best be accomplished by replicating the effects of competition. Therefore, in the absence of clear and substantial evidence that some other regulatory approach will better accomplish the purposes of the Act, we expect to pursue the goal of amending the features of the LEC price cap plan so that it replicates the competitive outcome as closely as practicable.

94. Implementing this goal usually will require an analysis of specific features of the current plan, their effect on the competitive outcome, the effect of possible revisions, and the conformance of revisions that appear to achieve a competitive

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[151] Section 202(a) of the Communications Act, 47 U.S.C. §202(a).

outcome with the purposes and provisions of the Communications Act. For example, any revisions we adopt may require analysis of their effect on another primary goal, universal service, as set out in Section 1 of the Act and as implemented in various current Commission programs. It may also require evaluation of the revision's effect on other Commission policies and the public interest. As a general corollary to the goal of seeking to both replicate and stimulate competitive outcomes, we will also prefer policies and programs that minimize distortion of competitive marketplace forces in telecommunications.

95. Based on this approach and the current record, we think it unnecessary, for purposes of the interim plan we adopt today, to set other price cap goals, as requested by some commenters. Revisions to the current plan that, for an interim period pending the adoption of our permanent plan, more nearly replicate the effect of competition are also likely to improve its performance in achieving other goals in an efficient manner. Infrastructure development is a case in point. To the extent the price cap plan creates incentives similar to those of competition, LECs should be encouraged to deploy the infrastructure needed to meet customer needs and to introduce new technological improvements and services, in the most cost-effective manner, because generating more demand and lowering costs will increase the LEC's profits. The fundamental objective of LEC price cap regulation is to ensure that rates for interstate telecommunications services are just, reasonable and nondiscriminatory pursuant to Title II of the Communications Act.[152] We therefore find that it is inappropriate to consider proposals for specific infrastructure goals and programs, including proposals to encourage LECs to provide inside wire facilities to schools and libraries, in the context of this LEC price cap performance review docket. In so finding, however, we emphasize that we will consider the need to adopt goals or programs that foster infrastructure development in other contexts unrelated to price caps. Consistent with this, we think it appropriate to consider proposals for extending the public switched telecommunications network to libraries and classrooms in an examination of universal service issues.

96. We also do not find that an adequate case has been made in the current comments for other new price cap goals. A goal such as open, nondiscriminatory access is largely subsumed within the broader goal of seeking to replicate competition, because it represents one policy mechanism to foster competition. It is, in fact, a mechanism the Commission often has applied, notably for

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[152] Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §201(b) and §202(a).

the LECs in the Part 69 access rules.[153] The question of whether to apply that mechanism in any individual case is likely to hinge on whether the mechanism best accomplishes the purposes of the Communications Act, is otherwise lawful, and warrants revising the Part 69 rules. That question is most likely to find an answer in proceedings specifically directed to considering those rules.

## IV. MAJOR BASELINE ISSUES

### A. Overview

97. In this Part we address three interrelated matters: the productivity adjustment, or X-Factor; the sharing and low-end adjustment mechanisms; and reinitialization of price-capped rates through a one-time rate reduction.

98. The record in this proceeding developed in two stages. In response to the Notice, interested parties filed comments by May 9, 1994, and replies by June 29, 1994. After the completion of that initial pleading cycle, a number of parties submitted ex parte statements to supplement or revise the arguments or proposals they made earlier. Many of these ex parte filings concerned the major baseline issues that are discussed in this section. Then, on January 18, 1995, USTA submitted an ex parte statement substantially revising the proposals regarding primarily baseline issues that it made in its May 9, 1994 comments.[154] USTA's submission was made at a comparatively late point in this proceeding. To ensure that all interested parties were aware of USTA's new proposals, the Common Carrier Bureau (Bureau) issued a public notice requesting comment on USTA's January 18 Letter.[155] Fifteen parties submitted comments,[156] and

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[153] Part 69 of the Commission's Rules, 47 C.F.R. §69.1 et seq.

[154] January 18 Letter.

[155] Public Notice, Common Carrier Bureau Invites Public Comment on USTA Ex Parte Submission, DA 95-102 (released. Jan. 24, 1995).

[156] Specifically, AT&T, Ameritech, BellSouth, US West, NYNEX, MCI, GSA, SWB, API, Pac Bell, and Time Warner submitted their comments on January 31, 1995. Ad Hoc submitted its comments on February 2, 1995, Comptel and LDDS Communications, Inc. (LDDS) submitted their comments on February 8, 1995, and Bell Atlantic submitted its comments on February 15, 1995. We refer to all these comments as "January 18 Comments." Some

three submitted replies.[157] Several new or revised proposals were submitted even later than USTA's filing and thus have received even less of an opportunity for comment by interested parties than USTA's January 18 Letter.[158] The discussions that follow will address both initial and ex parte filings in this proceeding as they relate to each issue and to each party's views of the issue addressed.

**B. The X-Factor**

**1. Background and Current Provisions**

99. The price cap index, or PCI, is adjusted each year based on a measure of inflation that embodies economy-wide productivity gains and price changes (the Gross National Product

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parties argue that USTA's proposal is procedurally defective because it was filed so late in this proceeding that parties were denied an adequate opportunity to comment on it. Ad Hoc January 18 Comments at 4-5; API January 18 Comments at 1-2; Time Warner January 18 Comments at 4-5. Bell Atlantic replies that USTA's January 18 Letter is a reasonable response to concerns raised by other parties in this proceeding, and could not have been submitted until the initial stage of the record was "fully explored." Bell Atlantic January 18 Comments at 3. We conclude that the Bureau's public notice gave interested parties an adequate opportunity to comment on USTA's revised proposal, and so we will include USTA's January 18 Letter in the record.

[157] USTA submitted a reply to AT&T's comments on February 9, 1995. CFA and ICA filed a joint reply on March 3, 1995, and AT&T responded to USTA's reply on March 10, 1995. We refer to these filings as "USTA January 18 Reply," "CFA-ICA January 18 Reply," and "AT&T January 18 Reply," respectively. In addition, on March 16, 1995, USTA filed another ex parte statement purporting to quantify the effects of the errors it alleged in its response to AT&T's comments.

[158] See Letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Acting Secretary, March 3, 1995 (NYNEX Mar. 3 Proposal). Sprint explained parts of its proposal in a number of ex parte statements. See, e.g., Letter from Warren D. Hannah, Director, Federal Regulatory Relations, Sprint, to Acting Secretary, December 29, 1994 (Sprint Dec. 29, 1994 Ex Parte Proposal); Letter from Warren D. Hannah, Director, Federal Regulatory Relations, Sprint, to Acting Secretary, February 2, 1995 (Sprint Feb. 2, 1995 Ex Parte Proposal); Letter from Jay C. Keithly, Vice President, Sprint, to Acting Secretary, February 15, 1995 (Sprint Feb. 15, 1995 Ex Parte Proposal). GTE submitted an ex parte statement in partial support of NYNEX's proposal on March 13, 1995.

Price Index (GNP-PI)), minus an X-Factor. The X-Factor is an offset that reflects the fact that telephone carriers, historically, have experienced cost changes, due to differences in productivity and input prices relative to the economy as a whole, resulting in telephone rate trends being below the level of inflation. In the LEC Price Cap Order, we determined that the GNP-PI does not fully reflect that the LECs' higher than average growth in productivity had resulted in lower than average telephone prices, relative to inflation. We therefore concluded that an offset must be included in the price cap formula to ensure that rates continued to decline in relation to the GNP-PI.[159] Price cap regulation is also intended to generate incentives and opportunities for LECs to achieve still higher productivity growth. In the LEC Price Cap Order, we mandated a price cap index that includes at least a 3.3 percent productivity offset each year, based on two Commission staff studies which, when averaged, indicated a historical productivity growth of 2.8 percent, and a consumer productivity dividend (CPD) of 0.5 percent.[160] Alternatively, price cap LECs may elect a 4.3 percent X-Factor.[161]

100. In the Notice, the Commission noted that the price cap LECs had experienced higher earnings on average under price caps than in earlier periods. Their rates of return had increased from 11.25 percent at the start of price caps,[162] to an average

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[159] LEC Price Cap Order, 5 FCC Rcd at 6796.

[160] LEC Price Cap Order, 5 FCC Rcd at 6796. A short-term study examined productivity trends in interstate access from 1984 to 1990, and a long-term study covered interstate charges generally for the years 1930 to 1989. The 0.5 percent CPD was then added to assign the first price cap productivity gains to customers in the form of lower rates.

[161] LEC Price Cap Order, 5 FCC Rcd at 6799. By selecting the more challenging 4.3 percent offset, the LEC lowers its rates an additional 1 percent, but may retain a greater portion of its profits if its efficiency gains exceed the offset. Id. at 6796; LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2641-42. A LEC selecting the higher productivity factor must use a 4 percent productivity factor for its interexchange basket. LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2642.

[162] The price cap indexes were initiated at a rate of return of 11.25 percent. See LEC Price Cap Order, 5 FCC Rcd at 6814; LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2643.

of 12.25 percent in 1992.[163] The Commission also noted that the LECs had enjoyed sharply declining interest rates during this period.[164] In view of these developments, we requested comment on whether the X-Factor used to compute the LEC price cap indexes should be changed and whether a one-time change in the LEC's price cap index should be required. We also asked what method should be used to determine a revised and reasonable X-Factor if the Commission decides to change the X-Factor. In addition, we asked whether the price cap LECs' profit levels are reasonable under the current LEC price cap plan in light of the price cap goal that higher profits are intended to be the reward for attaining increased efficiencies.

**2. Comments and Studies**

101. In the initial round of comments and replies filed in response to the Notice, USTA presented a plan for revisions to LEC price caps that was supported by most price cap LECs. A central feature of the USTA plan was its proposal to set a single X-Factor for all price cap LECs based on a study of LEC TFP performance relative to other firms in the economy from 1985 through 1992, and to leave the resulting 2.3 percent X-Factor unchanged for eight to ten years.

102. Comments and replies by IXCs such as AT&T and MCI and by telephone customers such as Ad Hoc, GSA, and others proposed their own changes to the current plan and generally opposed USTA's proposal for setting the X-Factor. These commenters claimed USTA's methodology was flawed and would result in an X-Factor that was far too low and that would give the LECs a windfall in future years. They proposed minimum X-Factors ranging from 5.0 percent (GSA) to 5.9 percent (MCI), based on several differing approaches and studies.[165]

103. Subsequently, on January 18, 1995, USTA filed ex parte a revised proposal for the LEC price cap plan. Under this proposal, LECs would have the option of electing an X-Factor based on a moving average of LEC productivity performance that would automatically adjust the X-Factor each year, based on the TFP methodology proposed in USTA's initial comments. In this

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[163] For the BOCs, 1992 rates of return ranged from a low of 11.41 percent for Bell Atlantic to a high of 13.32 percent for NYNEX, while GTE earned 11.26 percent, Rochester 12 percent, and United 12.81 percent.

[164] Notice, 9 FCC Rcd at 1696.

[165] GSA at first recommended a minimum X-Factor of 4.1 percent. GSA Comments at 8-10. GSA later increased its recommendation to 5.0 percent. GSA Reply at 14.

section we describe USTA's TFP Model, both as initially proposed and as revised in its ex parte filing; AT&T's Direct Model of Productivity; MCI's proposal to correct the Frentrup-Uretsky Study; and other proposals.

### a. USTA Total Factor Productivity (TFP) Model

#### i. USTA's Initial Proposal

104. In their initial comments, USTA and some of the LECs recommend reducing the productivity offset to 2.3 percent and eliminating the CPD. As discussed below, USTA also proposes revising the Common Line formula in a way that would lower the productivity hurdle of the X-Factor significantly.[166] A number of LECs maintain that TFP measures productivity better than an earnings-based measure, and because it is not influenced greatly by business cycle fluctuations.[167]

105. USTA bases its argument on two studies it commissioned, one performed by Christensen, Schoech, and Meitzen[168] and the other by NERA.[169] The Christensen Study measures the TFP of price cap LECs over the period 1984-92, based primarily on Form M data submitted by LECs to the Commission. It then compares this result to figures for multifactor productivity for private firms in the U.S. economy for the same period.

106. The Christensen Study computes TFP as the ratio of an index of total LEC outputs to an index of total LEC inputs. The rate of growth of TFP is the rate of growth of the output index minus the rate of growth of the input index. The outputs used in the study are local service, interstate end user access, interstate switched access, interstate special access, intrastate access, long distance service, and miscellaneous services. The revenue data for each category of output are divided by a price

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[166] USTA Comments at 80; BellSouth Comments at 46; GTE Comments at 73; SWB Comments at 36-39; Bell Atlantic Reply at 16; NYNEX Comments at 35-41.

[167] USTA Comments at 80; BellSouth Reply at 23; GTE Reply at 23; Pac Bell Reply at 17; US West Comments at 41-42; RTC Reply at 3, 8.

[168] Laurits R. Christensen, Philip E. Schoech and Mark E. Meitzen, "Productivity of the Local Operating Telephone Companies Subject to Price Cap Regulation," USTA Comments, Attachment 6 (Christensen Study).

[169] National Economic Research Associates, Inc., "Economic Performance of the LEC Price Cap Plan," USTA Comments, Attachment 5 (NERA Study).

index (reflecting the overall changes in rates for that category) to calculate quantity indexes for each category. Growth rates of quantity indexes and average revenue shares are calculated for each service category. A category's weighted growth rate is constructed as the product of the rate of growth of the quantity index and the category's average share of total revenue. The rate of growth of the (aggregate) output index is the sum of the weighted growth rates of the categories.

107. The input index is an aggregation of capital, labor, and materials indexes. The capital index results from aggregating six asset classes using each asset type's average shares of capital costs as weights.[170] The labor index is the result of aggregating management and nonmanagement labor.[171] The cost of materials is used to construct a materials index.[172] An (aggregate) input index is constructed from growth rates of capital, labor, and materials indexes. The weighted capital index growth rate is the average share of capital out of total costs multiplied by the rate of growth of the capital index. The weighted labor index growth rate is the product of the average share of labor out of total cost and the rate of growth of the labor index. The weighted materials index growth rate is the product of material's average share of total cost and the rate of

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[170] The capital index results from aggregating six types of assets. For each type of asset capital input quantities and capital input shares (that is for a given period, the asset type's share of total capital cost) are calculated. The weighted growth rate of an asset type is constructed as the product of the asset type's capital input quantity growth rate and the asset type's average capital input share. The rate of growth of the (aggregate) capital index is the sum of the weighted growth rates of all asset types.

[171] Labor consists of two categories: management and nonmanagement. Growth rates of hours worked and average shares of total labor costs are calculated for each category of labor. A labor category's weighted growth rate is constructed as the product of the growth rate of hours worked and the labor category's average share of total labor cost. The growth rate of the labor index is the sum of the weighted growth rates for both categories of labor.

[172] The cost of materials is used to construct the materials index. The cost of materials is the result of subtracting both depreciation and payments to labor from operating expense. Adjustments to the cost of materials are made for nonregulated activities and USOA accounting changes. The quantity index of materials is the result of dividing adjusted materials cost by GDP-PI. The growth rate of the materials quantity index is the growth rate of the materials index.

growth of the materials index. The rate of growth of the (aggregate) input index is the sum of the weighted capital index growth rate, the weighted labor index growth rate, and the weighted materials index growth rate.

108. For the 1984-1992 period, the Christensen Study concludes that total output, computed as described above, grew at an annual average rate of 3.5 percent, while inputs grew at 0.9 percent. Thus, the Christensen Study states that the LECs' TFP was an average of 2.6 percent per year. Because economy-wide TFP growth as reported by the Bureau of Labor Statistics averaged 0.3 percent over that same period, the Christensen Study concludes that the LECs' TFP is 2.3 percent greater than that reflected in the GNP-PI.[173] This differential of 2.3 percent, USTA maintains, represents the appropriate productivity factor to be used in the LECs' price cap index. USTA argues that there is no need to add an explicit consumer productivity dividend because the 2.3 percent factor will overstate actual long-term LEC productivity as competition continues to expand in LEC access markets, and because firms in competitive markets do not usually share the benefits of above-average productivity performance with their customers.[174]

109. The second USTA Study, prepared by National Economic

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[173] In fact, the 2.3 percent X-Factor was proposed after the initial round of comments. In its initial comments and reply, USTA proposed that the X-Factor be set at 1.7 percent, based on the Christensen Study's calculation that over the study period 1984-92 the average annual rate of growth in price cap LEC TFP was 2.6 percent, and that TFP growth for the U.S. private business sector from 1984-90, as measured by Bureau of Labor Statistics (BLS), was 0.9 percent. USTA recommended that the X-Factor be computed from the differential between these two figures, or 1.7 percent (2.6 percent - 0.9 percent = 1.7 percent). USTA Comments at 81-82. Subsequently, the BLS reported corrected figures that reduced the TFP growth figure for U.S. business sector firms to 0.3 percent. Thus, the revised differential became 2.3 percent (2.6 percent - 0.3 percent = 2.3 percent).

[174] USTA Comments at 84; accord NYNEX Comments at 40; Bell Atlantic Comments at 36. On January 20, 1995, USTA further revised its study results by adding 1993 data and correcting errors in data for prior periods. These revisions increased annual input growth from 0.9 percent to 1.0 percent, and lowered output growth from 3.5 percent to 3.4 percent. Accordingly, USTA revised its TFP offset from 2.6 percent to 2.4 percent (3.4 - 1.0), or 2.1 after adjusting for the corrected BLS data as discussed above. Letter from Mary McDermott, USTA, to William F. Caton, Acting Secretary, January 20, 1995.

Research Associates, Inc. (NERA), focuses on major components of the price cap formula, especially productivity and the X-Factor.[175] The study concludes that an appropriate X-Factor is the historical differential between the annual TFP growth of the regulated LEC industry and that of the U.S. economy. It thus supports the methodology of the Christensen Study.[176]

110. Central to NERA's interpretation of the X-Factor is the issue of input price changes. According to NERA, the GNP-PI inflation measure in the price cap formula measures output price changes for the U.S. economy as a whole, not changes in LEC input prices. If LEC input price growth rates differ from those in the U.S. economy, that difference is included as part of the productivity offset.[177]

111. To shed light on the relationship between telecommunications input price growth and national input price growth, NERA compared data for two periods: 1951-87 and 1984-90. For the first period, NERA relies on a TFP study conducted by L.R. Christensen which is said to show that long run input price growth for the United States has approximated telecommunications input cost inflation, differing by only 0.30 percent. NERA states that there was no statistically significant difference between the telecommunications industry and U.S. input price growth in the study. For the second period, NERA again relies on a Christensen Study for 1984-90. For the period of this study, NERA states that it finds no statistically significant difference between industry and U.S. input price growth. NERA concludes that the X-Factor should be the simple differential between the annual TFP growth of the regulated firm and the U.S. economy, and that there is no reliable evidence that input prices have grown -- or will grow -- at different rates for the telecommunications industry and the United States as a whole.[178]

**ii. Criticisms of and Proposed Revisions to the Initial USTA TFP Model**

112. Ad Hoc asserts that to mirror the efficiency incentives found in competitive markets, the Commission must include a representation of all the components of a competitive marketplace in its X-Factor formula and that the USTA proposal

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[175] See NERA Study, USTA Comments, Attachment 5.

[176] Id. at ii.

[177] Id. at 11, 14. NERA's calculations are discussed in more detail in an Appendix to this Order.

[178] Id. at 16.

fails to do so.[179] Ad Hoc argues that calculation of the X-Factor must include: (1) the historic post-divestiture LEC productivity growth rate; (2) a LEC input price differential reflecting that LEC input prices are rising at a slower rate than the GNP-PI; and (3) the appropriate consumer productivity dividend.[180] In particular, based on data taken from the Christensen Study, Ad Hoc concludes that the price of labor and the price of materials increased at a rate of 3.7 percent from 1984 to 1992. Again based on Christensen Study data, Ad Hoc concludes that the price of capital declined by 1.9 percent during that period. Ad Hoc concludes that LEC aggregate input prices grew at 1.1 percent, or 2.6 percent slower than GDP.[181] As a result, Ad Hoc computes an X-Factor of 5.7 as follows: 2.6 percent productivity growth rate, plus 2.6 percent input price differential, plus a 0.5 percent consumer productivity dividend.[182]

113. AT&T also contends that, to derive a TFP-based measure that corresponds to the price cap X-Factor, TFP differentials must be adjusted for the difference between GNP-PI and actual input price growths. AT&T asserts that such an adjustment adds 3.5 percent to the productivity offset calculated by the Christensen Study, and results in an implied X-Factor of a least 5.2 percent.[183]

114. MCI and AT&T challenge the use of the Christensen Study on the grounds that the outputs that the Christensen Study examines are not equivalent to the outputs that the LEC price cap plan covers.[184] They state that, in addition to the interstate access services which are capped by the plan, the Christensen Study includes four services that are not capped by the plan: local service, intrastate access, long distance service, and miscellaneous services. AT&T contends that this reliance on the LECs' data at the total company level, rather than on data specific to interstate access services, necessarily understates the LECs' interstate access TFP growth because growth in "high markup" services, such as access, contributes more to TFP growth than growth in the "low markup" services included in the total

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[179] Ad Hoc Reply at 30-31 and Attachment A (ETI Study).

[180] Ad Hoc Reply at 25, 31.

[181] Ad Hoc Reply at 27 and Attachment A at 10-12.

[182] Ad Hoc Reply at 31.

[183] AT&T Reply at 28-29.

[184] MCI Reply at 26-29; AT&T Reply at 30.

company level data."[185]

115. Concerning proposals to adjust its TFP study for input price differentials, USTA argues that NERA's study shows that there is no statistically significant difference between long-term LEC industry and U.S. input price growth.[186] USTA claims that Ad Hoc ignores studies that contradict its assertion regarding the input price differential, and that the extreme fluctuation in input price series militates against using data from only a few years.[187]

116. In an affidavit submitted as an ex parte statement on February 1, 1995, USTA claims there is no evidence of any significant difference in growth rates for LEC input prices and economy-wide input prices from 1949 to 1992.[188] Although USTA notes that there has been volatility in the input price differentials for both labor and capital since about 1984, USTA asserts that these are short-term fluctuations and not indications of a change in long-term trends.[189] With respect to the cost of capital, USTA states that the relevant measure is the opportunity cost of capital.[190] USTA recognizes that there appears to be a large difference in LEC and economy-wide opportunity cost of capital. USTA states, however, that its methodology for measuring LEC opportunity cost of capital and its methodology for measuring economy-wide opportunity cost of

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[185] AT&T Reply at 30; see also MCI Reply at 29 (the annual average growth rate for interstate access services is 6.4 percent, as opposed to the 3.5 percent growth that the Christensen Study computed for all LEC services).

[186] USTA Reply at 55; see also US West Reply at 26 (even if LEC input prices were growing at a slower rate than the GNP-PI, it would be inconsistent with price caps to incorporate such an adjustment because it would constitute a general exogenous adjustment for changes in the prices of LEC inputs).

[187] USTA Reply, Attachment 4 at 23-28.

[188] Affidavit of Dr. Laurits R. Christensen, attached to Letter from Frank McKennedy, USTA, to William F. Caton, Acting Secretary, Feb. 1, 1995, at 5-6 (Christensen Aff.).

[189] Christensen Aff. at 6-10.

[190] USTA defines opportunity cost of capital as the foregone returns that could have been earned if the funds used to acquire the capital goods were invested somewhere else. Christensen Aff. at 7.

capital are not directly comparable.[191]

**b. USTA's Proposal of January 18, 1995**

117. On January 18, 1995, USTA submitted a substantial revision to its proposal. USTA recommends, as an option to the current 3.3 percent X-Factor, allowing a LEC to base its X-Factor on TFP growth differential for all LECs relative to economy-wide TFP growth. This TFP-based X-Factor would be recalculated annually, and set equal to the average TFP differential of five previous years.[192] In addition to this "five-year moving average," USTA would include a "two-year lag,"[193] so that data from the third to the seventh years prior to the annual tariff filing would be included in the moving average, but data from the two years immediately preceding the annual tariff filing would not. USTA argues that this two-year lag is necessary to ensure that the Bureau of Labor Statistics (BLS) has published the information necessary to calculate TFP.[194]

118. USTA maintains that the data needed to calculate the TFP differential is available from public sources and would be easy to update annually.[195] According to USTA, a five-year

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[191] USTA equates the LECs' opportunity cost of capital to Moody's composite yield for public utility bonds. Christensen Aff. at 7. USTA then measures economy-wide opportunity cost of capital implicitly, by subtracting from GDP labor costs, depreciation, taxes, inflation, and the current cost of net capital stock. Id. at 7-8 and Attachment F. USTA notes that its measure of LEC opportunity costs of capital growth rate has declined from 14.03 percent in 1984 to 7.45 percent in 1993, while its implicit measure of economy-wide opportunity costs of capital has ranged from 12.39 percent to 14.65 percent during this period. Id. at 7-8 and Attachment F. USTA contends that the interest rates it used to measure LEC opportunity cost of capital are unlikely to continue to decline, and have increased to 9.0 percent recently, and that its methodologies for measuring LEC opportunity cost of capital and economy-wide opportunity cost of capital do not yield comparable results. For these reasons, USTA asserts that there is insufficient data to conclude that LEC input prices will continue to be lower than economy-wide input prices. Id. at 9-11.

[192] January 18 Letter at 2, and Attachment 1 at 1-2.

[193] Id.

[194] January 18 Letter, Attachment 1 at 3.

[195] January 18 Letter, Attachment 1 at 1.

period would smooth out short-term fluctuations in productivity.[196] USTA asserts that the Interstate Commerce Commission (ICC) uses a five-year moving average with a two-year lag in its railroad regulation.[197] USTA calculates that the LEC TFP differential five-year moving averages in 1990, 1991, and 1992 have been 2.5 percent or 2.6 percent.[198]

119. According to USTA, a moving average X-Factor eliminates the need for a CPD because productivity gains are reflected in the price cap formula.[199] USTA recommends phasing the CPD down, rather than eliminating it immediately, to provide benefits to consumers during the first two years that the lagged moving average takes effect. USTA would set the CPD at 1 percent in the first year, 0.5 percent in the second year, and 0.25 percent in the third year.[200] USTA also would lower LEC price cap indexes by 1 percent immediately to pass on benefits to consumers.[201]

120. There are a number of other elements in USTA's revised proposal, such as elimination of the sharing and low-end adjustment mechanisms, narrowing the exogenous cost rules, and replacing Part 69 with more flexible rate structure rules. We discuss these aspects of USTA's revised proposal in other sections in this Order.

121. A number of LECs assert that use of a "moving average" would eliminate much of the controversy regarding whether the X-Factor is calculated properly.[202] SWB argues that a moving average would permit innovators to benefit from their increased productivity until competitors learn to match those results, and thus matches the effects of competition.[203] SWB supports basing

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196 January 18 Letter, Attachment 1 at 2-3.

197 January 18 Letter, Attachment 1 at 3.

198 January 18 Letter, Attachment 1 at 5, Table 2.

199 January 18 Letter at 1.

200 January 18 Letter at 3.

201 January 18 Letter at 3-4.

202 SWB January 18 Comments at 4-5; US West January 18 Comments at 2; Bell Atlantic January 18 Comments at 3-5. See also GSA January 18 Comments at 2-3 (supports moving average, but recommends against using USTA's method of calculating the X-Factor).

203 SWB January 18 Comments at 7-8.

the moving average on a five year period, arguing that five years is the minimum length of time necessary to reflect the time required to deploy equipment throughout a LEC's network.[204] According to SWB, a high productivity offset of 5.7 percent, as recommended by CARE, would create large price decreases. SWB also contends that such price reductions act to limit the LECs' pricing flexibility, and as a result, LECs might be unable to move prices towards efficient levels.[205] SWB maintains that the initial 1 percent CPD and 1 percent reduction in price cap indexes provide adequate consumer benefits during the early years of USTA's plan, while the X-Factor adjustments are lagged.[206] BellSouth agrees that the initial CPD provides additional consumer benefits, but maintains that the Commission could not justify a one-time PCI reduction unless it was part of a voluntary regulatory system as USTA proposes.[207] SWB contends that TFP is the only reasonable method of establishing an X-Factor, and alleges that AT&T, Ad Hoc, and USTA agree that TFP is the only way to measure productivity.[208] AT&T states that it disagrees with USTA's TFP methodology.[209]

122. A number of commenters maintain that the X-Factor should be almost double that of USTA's estimate.[210] Several parties assert that USTA's study does not treat input prices correctly because it fails to reflect the difference between growth in LEC actual input prices with growth input prices in the economy as a whole.[211] MCI and API argue that the productivity

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[204] SWB January 18 Comments at 8.

[205] SWB January 18 Comments at 13.

[206] SWB January 18 Comments at 5-6.

[207] BellSouth January 18 Comments at 8-10.

[208] SWB January 18 Comments at 8-9.

[209] AT&T January 18 Comments at 6.

[210] Ad Hoc January 18 Comments at 8; API January 18 Comments at 2-3; GSA January 18 Comments at 3; MCI January 18 Comments at 8-9; AT&T January 18 Comments at 4. AT&T also asserts that much of the data in the Christensen Study predate the adoption of LEC price cap regulation, and so is not relevant to LEC performance under price caps. AT&T January 18 Reply at 4-5.

[211] Ad Hoc January 18 Comments at 6-7; GSA January 18 Comments at 2-4; MCI January 18 Comments at 7-8; AT&T January 18 Comments at 3-4. Arguments for and against adjustment of TFP studies for LEC input price differentials are summarized in more detail in Section IV.B.2.a.ii. of this Order, above.

offset in USTA's proposal is too low to stimulate significant productivity growth or efficiency gains, more efficient pricing, or infrastructure improvements.[212] CFA and ICA note that British regulators currently apply an 8 percent X-Factor to British Telecom.[213]

123. AT&T and MCI criticize USTA for using LEC total company data rather than LEC interstate access data.[214] USTA answers that there is no non-arbitrary method of separating interstate access TFP from total company TFP.[215] AT&T also contends that the one-time 1 percent index reduction would be a relatively insignificant reduction.[216] Bell Atlantic suggests that any greater reduction would exceed the price changes that would result from an "appropriate" productivity formula.[217]

124. AT&T maintains that the two-year lag and moving average only delay reflecting productivity improvements in the price cap formula.[218] MCI argues that an annual review of LEC productivity, necessary to develop the moving average, will increase administrative burdens.[219] Ad Hoc contends that a moving average X-Factor based on LEC data encourages excessive network investment, and may lead to "gold-plating" incentives similar to those created by rate-of-return regulation.[220] Therefore, Ad Hoc recommends including other telecommunications service providers in the TFP calculation if the Commission were to adopt USTA's proposal in some form.[221]

125. MCI contends that the Commission should reject USTA's proposal because the Commission has already considered and

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[212] MCI January 18 Comments at 2-4, 6; API January 18 Comments at 3. See also CFA-ICA January 18 Reply at 1-2.

[213] CFA-ICA January 18 Reply at 2-3.

[214] AT&T January 18 Comments at 5; MCI January 18 Comments at 8.

[215] USTA January 18 Reply at 4.

[216] AT&T January 18 Comments at 8-9.

[217] Bell Atlantic January 18 Comments at 6.

[218] AT&T January 18 Comments at 7.

[219] MCI January 18 Comments at 4-5.

[220] Ad Hoc January 18 Comments at 15-17.

[221] Ad Hoc January 18 Comments at 17-18.

rejected developing an X-Factor based on TFP in the LEC Price Cap Order.[222] AT&T argues that USTA's revenue weighting of common line costs is inconsistent with the "balanced 50-50" formula of the LEC price cap plan, and that this also tends to understate productivity and the X-Factor.[223] AT&T also asserts that USTA's proposal is based on a different depreciation methodology than that approved by the Commission.[224] USTA responds that the 50-50 formula would have resulted in a lower productivity measure.[225] USTA also maintains that the prescribed depreciation rates do not measure the decline in the efficiency of assets.[226]

126. AT&T contends that it would be difficult to implement USTA's proposal, because the data necessary to measure TFP are not collected in ARMIS or other readily available sources.[227] AT&T also asserts that the Bureau of Labor Statistics (BLS) has revised the way it measures U.S. economy TFP, and that this might result in inconsistencies between BLS results and the Commission's results for LEC TFP.[228] AT&T also maintains that there are often substantial delays in the release of BLS TFP data.[229] Ad Hoc asserts that USTA's calculations are inaccurate, and that a TFP calculation is not as simple or routine as USTA suggests.[230]

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[222] MCI January 18 Comments at 5, citing LEC Price Cap Order, 5 FCC Rcd at 6796.

[223] AT&T January 18 Comments at 4.

[224] AT&T January 18 Comments at 5.

[225] USTA January 18 Reply at 4.

[226] USTA January 18 Reply at 4.

[227] AT&T January 18 Comments at 6; see also Ad Hoc January 18 Comments at 13-14 (data based on services provided off-tariff are not in ARMIS).

[228] AT&T January 18 Comments at 6-7.

[229] AT&T January 18 Comments at 7.

[230] Ad Hoc interprets USTA's TFP analysis as follows: If the difference between LEC and economy-wide input price growth decreases, then the difference between LEC TFP and economy-wide TFP should increase, and therefore there should be an increase in measured LEC productivity growth. Ad Hoc claims that USTA did not report this result in its January 18 Letter, and concludes from this that TFP calculations are not simple or routine. Ad Hoc January 18 Comments at 9-11. Similarly, Ad Hoc notes that, on January 16, 1995, USTA provided an update to the TFP study

### c. The AT&T Direct Model of Productivity

127. AT&T presents its own model for setting the X-Factor, which it calls the Direct Model.[231] This model derives the level of productivity the LECs achieved under price caps from January 1991 through December 1993 using publicly filed LEC data in the Commission's ARMIS data base and in the Tariff Review Plans (TRPs) accompanying each annual access tariff. The Direct Model computes the X-Factor that would have produced exactly an 11.25 percent rate of return under price caps. AT&T states that the methodology is the same as followed by a LEC in computing its sharing obligations under price caps.[232]

128. According to AT&T, the Direct Model shows that LECs achieved an average X-Factor of 5.97 percent under price caps. AT&T recommends that the LECs' productivity factor be set at this level, less a 0.5 percent "productivity dividend" for exceeding the 3.3 percent goal, to encourage LECs to continue to perform efficiently.[233] AT&T maintains that increasing the productivity offset will not "recapture" any part of the $2.5 billion in additional revenues achieved thus far under price caps, but rather would operate solely prospectively to ensure that ratepayers receive at least the same level of benefits as under rate of return regulation.[234]

129. A number of LECs maintain that AT&T's study is inadequate because they examined only short-term earnings over a

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USTA provided in its Comments, to include 1993 data. Ad Hoc contends that, although LEC data for 1993 are available, BLS data are not yet available for 1993. Ad Hoc also maintains that USTA has not justified revising its pre-1993 data. Ad Hoc January 18 Comments at 10-13.

[231] AT&T Comments, Appendix B.

[232] If the Commission adopts AT&T's suggestion of a per line formula for the common line basket, then AT&T recommends setting the productivity factor at 4.63 percent. AT&T Comments at 23-24, 26. If the Commission imposes a one-time PCI reduction to reflect reductions in the cost of capital, as AT&T suggests, then AT&T maintains that the X-Factor should be reduced by an additional .55 percent. Id. at iv. AT&T's positions on the common line formula and the need for a one-time rate reduction are discussed in more detail infra.

[233] AT&T Comments at 23.

[234] AT&T Reply at 27 n.53.

three-year period rather than long-term productivity.[235] USTA claims that AT&T's productivity calculations are substantially overstated because they "appear to have been based on what AT&T assumed to be a single year's productivity gain."[236] USTA contends that AT&T provided insufficient data to validate its proposed LEC productivity factor and productivity dividend.[237] SWB and Pac Bell assert that AT&T's study overstates estimated productivity due to an arithmetic error and conceptual errors.[238] Several LECs also criticize AT&T's study because it considered only Bell Operating Companies rather than all price cap LECs.[239] Lincoln argues that RBOCs are not representative of all LECs, as AT&T asserts, because they have much larger service areas than most LECs.[240] In addition, Lincoln contends that it is misleading for AT&T to compare price cap earnings to a traditional rate of return to derive a productivity offset, because price cap regulation was designed to be "a departure from traditional rate of return regulation with price cap LECs assuming more risks for the possibility of more rewards."[241]

130. AT&T revised the data in its Direct Model in ex parte statements submitted on October 28 and November 29, 1994. In its October submission, AT&T added data from the second quarter of 1994.[242] In its November submission, AT&T expanded its study to include all Tier 1 price cap LECs.[243] After incorporating these revisions, AT&T concludes that the X-Factor which would have

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[235] USTA Reply at 59-60; Lincoln Reply at 8; GTE Reply at 23-25. See also USTA January 18 Reply at 2-3.

[236] USTA Reply at 60.

[237] USTA Reply at 59-60.

[238] SWB Reply at 39-40; Pac Bell Reply at 20-21.

[239] SWB Reply at 39-40; Lincoln Reply at 4-9; USTA Reply at 60 n.194.

[240] Lincoln Reply at 7.

[241] Lincoln Reply at 4-5. Similarly, some LECs contend that increasing the productivity offset in response to the increase in LEC earnings would constitute a return to rate-of-return regulation. Bell Atlantic Reply at 14-16; SWB Reply at 30-31; RTC Reply at 10.

[242] Letter from Richard N. Clark, AT&T, to William F. Caton, Acting Secretary, October 28, 1994 (AT&T October 28 Letter).

[243] Letter from Richard N. Clark, AT&T, to William F. Caton, Acting Secretary, November 29, 1994 (AT&T November 29 Letter).

produced an 11.25 percent average rate of return from January 1991 to June 1994 is 5.54 percent. Thus, AT&T disagrees with commenters who argued that including only RBOCs in its original study resulted in a significantly overstated X-Factor.[244]

131. In its reply to AT&T's comments on its January 18 ex parte statement, USTA asserts that AT&T overstates LEC earnings by assuming that all price cap LECs set their prices at the ceiling.[245] USTA claims that AT&T made several methodological errors which resulted in overstating LEC productivity gains under price cap regulation.[246] USTA also alleges that AT&T may have double-counted LEC exogenous cost reductions during the price cap period.[247] AT&T claims that it is necessary to use actual PCIs rather than APIs to determine what X-Factor would have yielded an 11.25 percent rate of return.[248] AT&T asserts that USTA's criticisms of its methodologies are either groundless or result in a higher X-Factor.[249] AT&T denies that its model double-counts exogenous costs.[250]

**d. X-Factor Methodology Based on the Commission's Frentrup-Uretsky Study**

132. In an ex parte statement filed on September 29, 1994, USTA purports to update the Frentrup-Uretsky Study with data from 1990, 1991, and 1992.[251] This ex parte statement is discussed in detail in an appendix to this Order. According to USTA, the result of this update is an X-Factor of 2.67 percent.[252]

133. AT&T also presents what it terms a Simple Model for estimating LEC productivity. The Simple Model adopts a method used by the Commission in the original LEC price cap proceeding,

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[244] Id.

[245] USTA January 18 Reply at 3.

[246] USTA January 18 Reply at 3-4.

[247] USTA January 18 Reply at 4.

[248] AT&T January 18 Reply at 1-2.

[249] AT&T January 18 Reply at 2-3.

[250] AT&T January 18 Reply at 3.

[251] Letter from Linda Kent, USTA, to Acting Secretary, September 29, 1994 (USTA September 29 Ex Parte Statement).

[252] USTA September 29 Ex Parte Statement, Attachment 2 at 12-14.

which estimated that each 1 percent change in LEC rates of return translates into a 2.5 percent change in annual revenues (or costs). AT&T calculates that, over the period from January 1991 through December 1993, the RBOCs earned a composite average return of 12.89 percent, an increase of 1.64 percent over the initial 11.25 percent target rate of return. Based on this calculation, AT&T asserts that the RBOCs achieved an annual X-Factor of 6.96 percent.[253]

**e. The 1984 Data Point Issue in the Commission's Frentrup-Uretsky Study**

134. MCI recommends increasing the productivity factor from 3.3 percent to 5.9 percent.[254] MCI claims that the "outstanding" profits achieved by the LECs under price caps indicates that the 3.3 percent productivity factor is too low.[255] MCI contends that the Commission was too conservative in its determination of the productivity factor, and that it erred when it included the questionable 1984 tariff year data point in one of its two productivity studies, the Frentrup-Uretsky short-term study. MCI says that removing this data point would result in a productivity factor of 5.9 percent.[256]

135. USTA and some LECs maintain that the Commission should not reject the 1984 data point because MCI's reasoning on this issue has previously been rejected by the Commission.[257] USTA argues that the 1984 data point was not a statistical aberration and, even if the data point was unusual as compared to succeeding years, that does not mean that it was inaccurate or that it is of less value for purposes of measuring LEC productivity.[258] Lincoln faults MCI for failing to average its short-term LEC productivity results with any long-term study, as the Commission did previously. Lincoln argues that the use of a long-term study tempers the volatility of a short-term study and gives credence

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[253] AT&T Comments, Appendix C.

[254] MCI Comments at 18; id. at 23 (if the Commission adopts a per-line approach to the common line formula, it should increase the productivity offset to 5.5 percent).

[255] MCI Comments at 21-23.

[256] MCI Comments at 22.

[257] USTA Reply at 58; US West Reply at 25; Pac Bell Reply at 22-23; Bell Atlantic Reply at 14-16; GTE Reply at 26; Lincoln Reply at 6; SWB Reply at 41, citing LEC Price Cap Order, 5 FCC Rcd at 6801.

[258] USTA Reply at 58.

to the sustainability of the resulting productivity offset.[259]

136. SWB contends that MCI has overstated LEC profits under price cap regulation. SWB criticizes MCI for reflecting "extraordinary items" in the return on equity of the Bell Regional Holding Companies, without making that adjustment for AT&T's or MCI's return on equity. SWB claims that, if the proper adjustments were made, the return on equity for the Bell Regional Holding Companies would be 9.28 percent; for AT&T, 19.61 percent; and for MCI, 15.86 percent.[260] SWB argues that the LECs' higher earnings under price caps is evidence that the incentives worked, not that there is some problem with the regulation.[261] SWB asserts that the price cap LECs reduced their access rates by $7.5 billion over the past four years.[262] SWB denies that LEC earnings have been unreasonably high under price caps, and asserts that an increase in earnings does not necessarily imply a decrease in consumer benefits.[263]

**f. Other Proposals and Arguments**

137. GSA argues that, in light of AT&T's comprehensive study of the achieved productivity factor from 1991 to 1993, and the comments of other parties, the Commission should increase the productivity factor to 5.0 percent.[264] Some LECs raise the same arguments against GSA that they raised against AT&T's study; i.e., AT&T's study examined an unreasonably short period of time, and included only BOCs rather than all price cap LECs.[265]

138. Several other commenters also support raising the productivity factor.[266] ARI and PaOCA recommend adopting a

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[259] Lincoln Reply at 6-7.

[260] SWB January 18 Comments at 21.

[261] SWB January 18 Comments at 15-16.

[262] SWB January 18 Comments at 17, 20.

[263] SWB January 18 Comments at 18, 20.

[264] GSA Reply at 14.

[265] USTA Reply at 59-60; SWB Reply at 39-40. USTA claims that a productivity study should be based on at least 8 to 10 years of data, so that business cycle fluctuations do not have a disproportionate impact on results. USTA Reply at 51.

[266] ARI Comments at 2-3; PaOCA Comments at 6-7; WilTel Comments at 21, 24-25; OCCO Comments at 7; API Reply at 8; CCTA Reply at 2, 17; ICA Comments at 12.

productivity factor in the range of 5 to 6 percent to more accurately reflect the efficiency gains in the telephone industry. ARI and PaOCA note that a panel of three administrative law judges for the Pennsylvania Public Utility Commission proposed a 5.29 percent factor based on productivity growth in the telephone industry.[267] API says that the productivity factor should be increased to 5.9 percent.[268] ICA recommends raising the productivity factor to 5.8 percent, exclusive of any additional CPD.[269] Also, ICA suggests increasing the CPD to 0.75 percent at the start of the second plan, and raising it to 1 percent in two years.[270]

139. In an ex parte comment submitted in November 1994, CARE submitted its own plan. CARE alleges that the price cap LECs have profited at the expense of their customers, and that some of the price cap LECs have not invested their profits in the network.[271] CARE asserts that the LECs achieved a 5.7 percent level of productivity under price cap regulation, and recommends increasing the productivity factor to 5.7 percent, excluding the CPD.[272]

140. Sprint and RTC urge the Commission to retain the current productivity factor.[273] RTC, USTA, and CSE claim that changing the productivity offset would effectively recapture efficiency gains that the LECs achieved under price cap regulation and thereby eliminate the price cap plan's efficiency-generating incentives.[274] Sprint asserts that the 2.8 percent productivity factor should not be raised because future productivity gains may not meet those of the recent past.[275] Sprint, however, urges the Commission to raise the CPD to 1.7 percent, and to implement a 2 percent permanent price cap revenue reduction as a quid pro quo for eliminating the sharing

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267 ARI Comments at 2-3; PaOCA Comments at 6-7.

268 API Reply at 7.

269 ICA Reply at 3, 22-23.

270 ICA Comments at 12.

271 CARE November 1994 Ex Parte Submission at 4-5.

272 CARE November 1994 Ex Parte Submission at 11, 13.

273 Sprint Comments at 11-13; RTC Reply at 3, 8.

274 RTC Reply at 9; USTA Reply at 51-52; CSE Reply at 2-3.

275 Sprint Reply at 11-12, 14.

adjustment mechanism.[276] Sprint contends that the Commission should adjust the X-Factor only to counteract the effects of eliminating sharing, revising the common line formula, or making any one-time rate reinitialization.[277] Pac Bell contends that the LECs' productivity growth was only 1.7 percent higher than the economy as a whole from 1984 to 1992, and is likely to decrease as access competition grows. Pac Bell advocates eliminating the productivity factor, but maintains that in any case, the X-factor should be no higher than 1.7 percent.[278]

141. In ex parte proposals, Sprint proposes that the Commission adopt a 3.3, a 3.9, and a 4.5 percent productivity factor.[279] Under Sprint's proposal, a price cap LEC that selects and outperforms the 3.3 percent productivity factor would be required to share with its customers half of its earnings between 11.75 percent and 13.75 percent, and return to ratepayers all of its earnings in excess of 13.75 percent. A price cap LEC electing the 3.9 percent productivity factor would be required to share with its customers half of its earnings between 12.75 percent and 15.75 percent, and all of its earnings in excess of 15.75 percent. If the earnings of a LEC selecting the 3.3 percent or 3.9 percent productivity factors fall below 10.25 percent in one year, the LEC would be entitled to adjust its rates upward to target its earnings to 10.25 percent the following year. LECs selecting the 4.5 percent productivity factor would not be subject to either sharing obligations or a low-end adjustment mechanism. Price cap LECs would be allowed to elect a productivity factor on an annual basis. However, price cap LECs that elect the 4.5 percent productivity factor would not be allowed to choose a lower productivity factor.[280] LECs

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[276] Sprint Reply at i-ii, 4-5. See also US West Comments at 41-42 (opposing X-Factor reduction if such reduction results in retaining sharing requirements).

[277] Sprint Comments at 12-13.

[278] Pac Bell Comments at 28-34. Pac Bell also suggests that, if the productivity factor is retained in the price cap formula, then we should allow annual adjustments to the productivity factor, based on a "depreciation deficiency reserve" that is based on what Pac Bell considers to be "realistic economic lives" of LEC assets. Id. at 34.

[279] Sprint Feb. 2, 1995 Ex Parte Proposal; Sprint Feb. 15, 1995 Ex Parte Proposal (under Sprint's proposal, the 4.5 percent productivity factor would be composed of a 2.8 percent productivity offset and a 1.7 percent consumer productivity dividend).

[280] Sprint Feb. 2, 1995 Ex Parte Proposal.

choosing the 4.5 percent productivity factor would qualify for more streamlined regulation and greater pricing flexibility.[281]

142. USTA denies that higher LEC earnings warrant a higher productivity factor, asserting that earnings are based on accounting costs, not economic costs. USTA says that this difference can result in a substantial disparity between earnings and true productivity.[282] Many LECs contend that, in any case, LEC earnings were reasonable in light of the increasing business and regulatory risks faced by the LECs.[283]

143. GTE and NYNEX, in response to ARI and PaOCA's comments, allege that the Commission has already determined that state proceedings should have no bearing on federal price cap plans because the plans differ and the productivity of one state cannot be assumed to apply to the nation as a whole.[284]

**3. Analysis**

144. In this Report and Order we take two actions regarding the X-Factor. First, we conclude that there is an insufficient record to choose a long-term methodology for computing the X-Factor. Thus, we direct the Common Carrier Bureau to draft a Further Notice of Proposed Rulemaking seeking further comment and analysis on development and implementation of such a methodology. Second, pending definitive resolution of this issue in the Further Notice, we set interim X-Factors for the 1995 annual access tariff filings. Those adjustments factors are set forth in Section IV.C., below.

145. We are persuaded that we must develop a new productivity factor to replace the X-Factor in the current price cap formula. Based on the record before us, however, we are able to decide only on the broadest features of the new X-Factor: it should be based on an industry-wide measure of performance, and it should incorporate productivity changes that have occurred since the institution of price cap regulation. We reach three

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[281] Sprint Dec. 29, 1995 Ex Parte Proposal. Specifically, LECs electing the 4.5 percent productivity factor would qualify for immediate implementation of zone density pricing. In addition, these price cap LECs would be allowed to move depreciation rates to economic levels, and to write down reserve deficiencies.

[282] USTA Reply at 49-51.

[283] USTA Reply at 50; Ameritech Reply at 5; BellSouth Reply at 21; Lincoln Reply at 4.

[284] GTE Reply at 27; NYNEX Reply at 34-35.

additional, tentative conclusions concerning the new X-Factor. First, we tentatively conclude that the X-Factor should not be fixed for a period of years, but should be recalculated routinely and automatically, as a moving average. Second, we prefer, if possible, to develop our new X-Factor using a TFP methodology and tentatively conclude that we should adopt this methodology. Third, we tentatively conclude that the long-term LEC price cap plan should have at least two options. We will explore these tentative conclusions and seek additional comment in the forthcoming Further Notice.

**a. Use of an Industry-wide Measure of Performance**

146. The current X-Factor embodies our original assessment of the extent to which the productivity of the LEC industry as a whole has, in the past, exceeded the productivity of the general economy. This use of an industry-wide average productivity factor is consistent with our goal of creating a price regulation plan that replicates the incentives provided by competition.[285] The LECs are, in effect, made to compete against the industry average. As in competitive markets, those that are more efficient and more innovative than average can achieve above-average profits, while those that lag the industry in performance will also lag in earnings. There is broad support in the record of this proceeding for continuing to determine the X-Factor based on some industry-wide measure of performance. No party, for example, suggests that we attempt to calculate individual X-Factors for each price cap LEC. Accordingly, we find that the productivity adjustment in the LEC price cap formula should continue to be based on an industry-wide measure of performance.

147. Parties do not agree, however, on what data should be included in the determination of an industry-wide average productivity factor for the LEC industry. USTA would include data from all LECs in its moving average TFP study.[286] AT&T claims that its Direct Model produces a valid LEC productivity offset using RBOC data only,[287] while other parties contend that the RBOCs are not a valid proxy for the entire LEC industry[288] and that the omission of GTE data, in particular, unacceptably

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[285] See Section III.B. of this Order, supra.

[286] January 18 Letter, Attachment 1 at 1.

[287] AT&T Comments at 24. AT&T later expanded its study to include all price cap LECs, and claims that this has only minor effects on its results. AT&T October 28 Letter; AT&T November 29 Letter.

[288] Lincoln Reply at 7.

skews AT&T's results upward.[289] Ad Hoc argues that a moving average TFP study must include telecommunications providers other than LECs to avoid providing the LEC industry as a whole with perverse investment incentives similar to those created by rate of return regulation.[290] The ICC's railroad regulation, cited by USTA as an example of a five-year moving average with a two-year lag,[291] makes adjustments for average productivity improvements to an all-inclusive index of railroad input prices, rather than GNP-PI or GDP-PI.[292] We intend to seek additional comment on this issue in the Further Notice.

**b. Incorporation of Productivity Changes that have Occurred Under Price Cap Regulation**

148. For the initial period of the LEC price cap program, we selected a productivity factor based on estimates of the historical performance of the industry under rate-of-return regulation. At the time, these were the best data available to us. We reasoned that allowing carriers to adjust their initial, rate of return-based rates for inflation, minus the historical productivity differential, would ensure that rates under price caps were no higher than they would have been under continued rate-of-return regulation, and would force carriers to become more efficient in order to earn more than they would have earned under rate-of-return regulation.

149. The largest LECs have now been under price cap regulation for four years. AT&T argues that we should recalculate the X-Factor based solely upon what it asserts is a measurement of the actual level of productivity increase achieved by the LECs under price caps. USTA's revised proposal for an optional moving average X-Factor would, after a few years, also produce an X-Factor based entirely on productivity performance under price caps. We perceive in these otherwise disparate proposals of AT&T and the LEC industry a developing consensus that LEC performance under price caps must, in the long-term, be reflected in a revised X-Factor.

**c. Development of a Moving Average X-Factor**

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[289] SWB Reply at 39-40; USTA Reply at 60 n.194.

[290] Ad Hoc January 18 Comments at 15-17.

[291] January 18 Letter, Attachment 1 at 3.

[292] See, e.g., Ex Parte No. 290 (Sub. No. 4), Railroad Cost Recovery Procedures, Productivity Adjustment, 5 ICC 2d 434, 437-38 (1989); Ex Parte No. 290 (Sub. No. 5), Quarterly Rail Cost Adjustment Factor (Decided Sept. 15, 1993).

150. The initial round of comments and replies on the X-Factor issue focused on setting a fixed X-Factor for a period of years, until the next comprehensive review. USTA's modified proposal calls for permitting LECs the option of setting the X-Factor in a substantially different manner, as an annually adjusted moving average.

151. The comments filed in response to the USTA proposal show significant support for the concept of a moving average X-Factor, and even those opposing the USTA proposal have not raised fundamental problems with the moving average concept. The LEC commenters strongly support use of a moving average. US West urges, for example, that a moving average sidesteps much of the protracted debate about how to set and revise the X-Factor, while eliminating distortions and disincentives inherent in rate-of-return regulation and providing incentives to increase efficiency.[293] BellSouth claims that the moving average ensures that consumers receive the benefit of the actual productivity improvement achieved by the LECs, while eliminating the need for frequent price cap productivity performance reviews or for a sharing mechanism.[294]

152. Although AT&T and MCI strenuously object to the use of TFP for setting the X-Factor, as well as to most other aspects of USTA's revised proposal, they do not present any reasons for concluding that use of a moving average of LEC performance would not better serve the goals of LEC price caps than an X-Factor that was fixed for a period of years.[295] GSA expressly supports the concept of an annual moving average update of the X-Factor, but proposes that the moving average be based on the AT&T Direct Model, and not on USTA's TFP approach.[296] Ad Hoc, however,

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[293] US West January 18 Comments at 3.

[294] BellSouth January 18 Comments at 7-8.

[295] AT&T claims that a five year moving average with a two-year lag would understate the productivity adjustment, because rising productivity characterizes LEC operations. AT&T January 18 Comments at 7. It is unclear, however, that this characterization is accurate or will be so in the future. Even if it is, a moving average could reflect this trend more promptly than waiting for the next performance review. AT&T's criticism would appear to question only the number of years to be averaged and the lag to be used in setting the moving average, not the merits of a moving average per se. MCI's only specific objection to use of a moving average is that an annual update would increase the Commission's administrative burdens. MCI January 18 Comments at 5.

[296] GSA January 18 Comments at 3.

objects to the use of an annually recalculated LEC-specific TFP measure as circular and self-serving, arguing that it would give LECs the ability and the incentive to keep productivity measures low.[297]

153. We tentatively conclude that use of a moving average of LEC performance data to set the X-Factor could substantially improve the LEC price cap plan. We see several potential benefits in the use of a routinely updated X-Factor. First, a rate formula that incorporated changes in industry-wide productivity growth into the X-Factor automatically could eliminate the need for frequent performance reviews. Our experience in the instant docket demonstrates that a four-year review cycle requires parties to take positions and formulate proposals based on only two or three years worth of data; consumes large amounts of public and private resources; and creates extended periods of uncertainty for both LECs and their customers. Second, as discussed in more detail in Section IV.C, below, use of a moving average X-Factor could allow us to reduce or eliminate reliance on sharing as a means of ensuring that consumers receive the benefits of LEC productivity gains and that rates remain just and reasonable.[298]

154. The virtues we see in the moving average concept are not necessarily linked to a particular methodology for measuring productivity, such as TFP, or to any of the other specific features of the revised USTA proposal. We therefore reject the suggestions of parties that urge us to either accept or reject

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[297] Ad Hoc January 18 Comments at 15.

[298] We note that, in another context, we have recently rejected use of a moving average of Treasury Bond yields to measure changes in the cost of capital. Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Process, Report and Order, CC Docket No. 92-133, FCC 95-134 (adopted Mar. 30, 1995) (ROR Reform Order), at para. 38 and n.102. That decision is not inconsistent with our tentative determination here that using a moving average to update the price cap X-Factor is superior to fixing the X-Factor for a period of years. The cost of capital is far more volatile than productivity. With respect to the cost of capital, we found that a moving average gives too much weight to past periods in a changing capital market and thus may be too slow to identify permanent cost of capital changes. Id. at para. 38. By contrast, productivity changes slowly, and averaging measurements of productivity over some period of years improves the predictive value of the X-Factor.

USTA's revised proposal in its totality.[299] Instead, we intend to seek further comment both on the concept of using a routinely updated X-Factor and on different methods of implementing that concept.

**d. Total Factor Productivity versus the AT&T Direct Model**

155. We come to merely a tentative conclusion that a TFP approach should be used in the future to compute the X-Factor in the LEC price cap rate formula, because the current state of the record suggests possible problems with the use of TFP, which cannot be readily resolved absent further information and analyses from interested parties. Therefore, in the Further Notice, we will also seek further comment on the AT&T Direct Model.

156. To calculate the annual adjustment to the PCI, the X-Factor is subtracted from the nationwide rate of inflation as measured by the GNP-PI. Thus, the X-factor is intended to capture differences in the rate of cost changes for LECs in comparison with the rate of cost changes in the economy as a whole. LEC costs of providing a unit of service depend on both the amounts of inputs required to produce that output (LEC productivity) and the costs of those inputs. Both of these sources of cost change are appropriately considered in setting the X-Factor.

157. Consider first productivity changes. The LECs historically have achieved higher productivity growth than other sectors of the economy. All parties agree that this differential is not accounted for by the GNP-PI and must thus be reflected in the X-factor. Because TFP studies actually measure productivity growth rates, a TFP approach would appear to be ideally suited to determining the X-Factor. In the past, we have had to reject particular TFP indexes and studies because they were not sufficiently specific to the telephone industry, or because they were based on non-public data and thus could not be replicated or

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[299] Parties on either side of the debate claim with some passion that the USTA proposal should be either accepted immediately or rejected in toto. Compare SWB January 18 Comments at 4 n.5 ("SWBT is vehemently opposed to piecemeal consideration of the components of the proposal") with AT&T January 18 Comments at 1-2 ("USTA's additional proposals to eliminate the sharing mechanism and the consumer productivity dividend ("CPD") are so antithetical to the legitimate interests of access ratepayers as to warrant summary rejection by the Commission."). We expect that an objective analysis of the proposal both as a whole and its specific features is most likely to lead to an optimal plan.

verified.[300] Now, USTA's TFP proposal, which is specific to the price cap LECs and uses publicly available data, has persuaded us to renew our consideration of the TFP methodology.

158. USTA and the LECs claim that USTA's TFP approach would closely emulate the dynamics of a competitive market; could be generated and verified quickly, easily, and mechanically; and would ultimately cause 100 percent of the industry average TFP growth to be passed through to customers via relative reductions in the LEC price caps.[301] Other commenters contend that USTA's TFP differential dramatically understates the X-Factor because it fails to adjust for differences in input prices that the LECs experience as compared to firms generally in the economy,[302] fails to measure output in the same manner as the price cap formula,[303] uses a depreciation methodology that is significantly different from that approved by the Commission,[304] and incorrectly uses total company rather than interstate access service data.[305] Commenters also question whether use of TFP would be simple and mechanical, and whether Bureau of Labor Statistics data necessary to compute the TFP differential are in fact available on a timely basis.[306] These concerns have been highlighted by USTA's significant revision to critical data at a point late in this proceeding.[307]

159. The USTA Study is based on total (interstate and intrastate) company data. Some parties have argued that, if the Commission were to adopt a TFP approach, it should calculate TFP on an interstate basis.[308] No party has argued that the

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[300] See Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 3 FCC Rcd 3195, 3406-07 (1988) (AT&T Price Cap Further Notice).

[301] January 18 Letter, Attachment 1 at 1-3.

[302] E.g., Ad Hoc January 18 Comments at 7.

[303] AT&T Reply, Appendix B at B-7 to B-8.

[304] Id. at 29-30.

[305] Id. at 30.

[306] Ad Hoc January 18 Comments at 12; AT&T January 18 Comments at 7.

[307] See Letter from Mary McDermott, USTA, to Acting Secretary, January 20, 1995 (USTA January 20 Data Submission).

[308] AT&T January 18 Comments at 5; MCI January 18 Comments at 8.

production functions (the technological relationship between inputs and outputs) significantly differ for intrastate and interstate services in ways that can be readily measured or separated. Indeed, intrastate and interstate services are largely provided over common facilities.[309] We therefore tentatively conclude that TFP should be calculated on a total-company, rather than interstate, basis. To the extent that parties can establish in the further notice that inclusion of intrastate performance data introduces a systematic downward bias in TFP, we believe it preferable to address such a problem directly, rather than attempting to construct an interstate factor based on regulatory accounting and other regulatory requirements that may not fully reflect economic costs.

160. A second fact to consider in setting the X-Factor is that LECs purchase goods and services whose costs may also be changing relative to the economy as a whole. If the trend in LEC input costs is consistent with the performance of the national economy as a whole, that trend should be reflected in the GNP-PI factor used to adjust PCIs annually. But, if the inflation factor does not accurately reflect changes in the carrier's input costs, an X-Factor based on productivity changes alone will not capture the full extent of the differences between changes in LEC unit costs and the economy-wide inflation adjustment.

161. On the basis of the current record, we tentatively conclude that it is appropriate to incorporate an input price differential into a TFP-based X-Factor. The record is not, however, sufficiently developed to allow us to choose a specific methodology. Ad Hoc argues that we should use the average input price differential between price cap LECs and the economy as a whole over the period from 1984 to 1992. Ad Hoc does not, however, justify this differential as a reliable predictor of future price differentials. Indeed, USTA argues that future differentials can be expected to run in the opposite direction. The further notice in this proceeding will seek comment on this issue.

162. We find that, for the most part, further comment is required to explore the issues raised by the parties concerning the TFP proposal. We are particularly concerned by claims that

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[309] AT&T suggests that Dr. Christensen has presented evidence before state Public Service Commissions that the volume of interstate traffic overall is growing at a more rapid pace than is intrastate traffic, and therefore that interstate productivity growth exceeds intrastate growth. AT&T January 18 Comments at 5 n.12. In light of the fact intrastate and interstate services share common facilities, the traffic growth differential alone does not establish that it is meaningful to distinguish two different measures of productivity.

adoption of a TFP-based X-Factor with a rolling average would present formidable implementation problems. If the X-Factor is to be revised annually on the basis of a rolling average, the methodology for computing the X-Factor should be straight-forward and the data used in the calculation should be readily available. We are concerned that use of a TFP-based X-Factor with a rolling average may require the Commission and interested parties to devote substantial resources annually to review the calculation of the X-Factor.

163. The AT&T Direct Model presents an alternative approach to setting the X-Factor. This model measures the X-Factor that the LECs have in fact achieved during the first years of price caps based on the LECs' interstate rates of return. AT&T's earnings calculations are based on the cost and revenue data the LECs file with the Commission. Apparent advantages of this model are that it uses readily-available ARMIS data, reflects performance in providing the interstate services subject to price caps, and includes input cost changes. Possible disadvantages, as raised by LECs in their comments,[310] include the fact that data reported under Commission accounting, separations, and other rules may not accurately track economic costs in the way that a more market-based system might. The Direct Model also might require adjustment for changes in capital costs, which are reflected in TFP, to avoid periodic review of this factor. Also, in the Direct Model, the departure of actual rate of return from a target rate of return is a critical factor in measuring productivity.

164. As another alternative, we could use the methodology we used in the Frentrup-Uretsky Study. Both USTA and AT&T used some variation of the Frentrup-Uretsky methodology to support their X-Factor arguments. As explained in detail in Appendix E to this Order, USTA made three errors, one of which was very significant, in its update of the Frentrup-Uretsky Study which tended to understate LEC productivity.[311] In our analysis of the Frentrup-Uretsky Study in Appendix D, we made some refinements to the methodology used in that study. As explained in Appendix E, in addition to USTA's three errors, USTA's update differs from our refined methodology in three ways. Nevertheless, our refined Frentrup-Uretsky approach, possibly with further refinements and without the methodological errors introduced by USTA, may constitute a reasonable basis for developing the X-Factor. Again, further comment and analysis are needed to determine whether this model or the AT&T Direct Model can be used to calculate a moving average X-Factor that accurately measures LEC productivity changes.

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[310] See, e.g., USTA January 18 Reply at 2.

[311] See Appendix E.

### e. Number of X-Factor Options

165. The current price cap plan features two X-Factors, a required X-Factor of 3.3 and a higher, optional X-Factor of 4.3. Carriers that elect the higher X-Factor are permitted to keep a greater portion of their earnings before sharing than carriers using the lower X-Factor. Commenters in this proceeding have offered a wide range of proposals for creating X-Factor options. USTA's revised proposal would allow carriers to choose between remaining under the current formula and adopting the TFP-based moving average X-Factor approach; carriers electing the TFP approach would be relieved of sharing and would also forego the low-end adjustment. Sprint's ex parte proposal features three progressively higher X-Factors, the first two of which would be associated with sharing zones.[312] NYNEX's ex parte proposal for a four-option plan would tie the selection of the X-Factor to the development of competition.[313] AT&T's proposal, in contrast, does not appear to include provision for electing a higher X-Factor. We will consider all of these proposals in the Further Notice. We tentatively conclude, however, that in view of the heterogeneity of LEC performance under price caps, our plan in the future should have at least two choices. Indeed, in setting our interim plan, this heterogeneity, coupled with a corresponding need to provide the LECs with reasonable yet challenging productivity alternatives, supports the implementation of three options.

## C. The Rate-of-Return Backstop Mechanisms

### 1. Background

166. In the original LEC price cap proceeding, we were concerned that the price cap formula might not prove to be perfectly accurate either for the LEC industry or for individual LECs or market conditions. For that reason, we retained features of rate-of-return regulation in the LEC price cap plan, in the form of two backstop mechanisms, the sharing and low-end adjustments.[314]

167. The higher-end sharing mechanism seeks to ensure that LECs and their customers share fairly the risks and rewards of future productivity gains. Under the sharing mechanism, LECs are permitted to select a productivity offset of either 3.3 percent

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[312] See Sprint Feb. 2, 1995 Ex Parte Proposal; Sprint Feb. 15, 1995 Ex Parte Proposal.

[313] NYNEX March 3 Ex Parte Proposal.

[314] LEC Price Cap Order, 5 FCC Rcd at 6801.

or 4.3 percent. A LEC that selects and outperforms the 3.3 percent productivity offset is entitled to retain all of its earnings up to 1 percent above the initial 11.25 percent rate of return[315] (i.e., 12.25 percent).[316] A LEC using the 3.3 percent productivity offset must share 50 percent of its earnings between 12.25 percent and 16.25 percent, and 100 percent of its earnings in excess of 16.25 percent.[317] The sharing mechanism effectively allows a LEC selecting a 3.3 percent productivity offset to reach a maximum 14.25 percent rate of return.[318] A LEC selecting the higher 4.3 percent productivity offset may retain all of its earnings up to 13.25 percent. The LEC, however, must share with its customers 50 percent of its earnings between 13.25 percent and 17.25 percent, and 100 percent of its earnings in excess of 17.25 percent. The Commission stated that the sharing mechanism would "operate[] only as a one-time adjustment to a single year's rates, so a LEC would not risk affecting future earnings . . . ."[319]

168. The other backstop mechanism, the low-end adjustment mechanism, was intended to prevent any price cap LEC from experiencing such low earnings over an extended period of time that its ability to provide quality service and attract capital would be seriously impaired.[320] Under the low-end adjustment mechanism, if the earnings of a LEC fall below 10.25 percent in a base year, the LEC may raise its PCI, and consequently its rates, in the following year to the level required to earn 10.25 percent, using the prior period as the baseline.[321] The low-end adjustment mechanism allows a LEC the opportunity to earn a 10.25 percent rate of return on a prospective basis, but does not guarantee that the LEC will achieve such earnings. We set the lower adjustment mark at a level which is symmetrical with the

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[315] The initial 11.25 percent level corresponded to the rate of return established for rate-of-return carriers in Represcribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 7507 (1990) (Represcription Order).

[316] LEC Price Cap Order, 5 FCC Rcd at 6788.

[317] LEC Price Cap Order, 5 FCC Rcd at 6801.

[318] LEC Price Cap Order, 5 FCC Rcd at 6801.

[319] LEC Price Cap Order, 5 FCC Rcd at 6801; see also id. at 6788.

[320] LEC Price Cap Order, 5 FCC Rcd at 6787, 6801-02; LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2677.

[321] LEC Price Cap Order, 5 FCC Rcd at 6788.

12.25 percent top of the no sharing zone.[322] The low-end adjustment mechanism operates as a one-time adjustment to a single year's rates.[323]

169. In fashioning the backstop plan, we recognized on the one hand that it could reduce the LECs' efficiency incentives, and on the other that it might help achieve the goals of the Communications Act, including assurance of just and reasonable rates.[324] We concluded that the possibility of errors in the X-Factor supported adoption of the backstop, at least until we acquired additional experience with LEC price caps.[325]

170. In our Notice, we asked initially whether our concern that an erroneous X-Factor might produce unintended and undesirable results for individual LECs or their customers remained valid, or whether the backstop mechanisms could be replaced by adjustments to the X-Factor or other aspects of the plan. We also asked whether, in the event we decided to retain the backstop mechanisms, the mechanisms should be realigned with capital costs, and if so, how that realignment should take place.[326] We also asked whether the sharing and low-end adjustment mechanisms should be revised or eliminated.[327]

171. As discussed in the X-Factor section, supra, USTA presented a substantial revision to its LEC price cap plan proposal on January 18, 1995. In that revised proposal, USTA recommends replacing the backstop mechanisms with an X-Factor that would be adjusted automatically each year based on a five-year moving average of LEC total factor productivity (TFP) with a two-year lag. Our summary of the record concerning the backstop mechanisms describes first the initial round of comments and replies and then the comments filed in response to USTA's revised proposal.

**2. Comments and Studies**

**a. Revising or Eliminating the Backstop Mechanisms**

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[322] LEC Price Cap Order, 5 FCC Rcd at 6802.

[323] LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2691 n.166.

[324] LEC Price Cap Order, 5 FCC Rcd at 6801.

[325] Id.

[326] Notice, 9 FCC Rcd at 1697 (Baseline Issue 4a).

[327] Notice, 9 FCC Rcd at 1697 (Baseline Issue 4b).

172. Many commenters recommend elimination of both the sharing and low-end adjustment mechanisms.[328] SNET and Eagle recommend elimination of the sharing mechanism, but they express no opinion on the low-end adjustment issue.[329] Ameritech recommends eliminating the sharing mechanism and permanently embedding price cap LECs' 1994-95 sharing amounts in their baseline price cap indexes.[330] The commenters assert that the sharing and low-end adjustment mechanisms dull and distort LEC efficiency incentives.[331] Also, the commenters assert that the sharing mechanism discourages development of new services and investment in the domestic infrastructure.[332]

173. In addition, these commenters claim that there is no evidence of an error in the selection of the productivity offset or in any other aspect of the LEC price cap plan warranting retention of the sharing and low-end adjustment mechanisms.[333] GTE notes that the price cap plans for AT&T and the cable industry do not have sharing and low-end adjustment mechanisms,

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[328] USTA Comments at 9; Bell Atlantic Comments at iii; Lincoln Comments at 11; BellSouth Reply at 2; US West Comments at 8, 42; MFS Comments at 9; Pac Bell Comments at 43; NYNEX Comments at 28; SWB Comments at 43; CSE Comments at 5-6; GTE Comments at 67; RTC Comments at 12; Sprint Comments at 13-15; CSE Comments at 6.

[329] SNET Comments at 7; Eagle Comments at 1-2.

[330] Ameritech argues that the amount of sharing produced by price cap LECs by the third year of the plan provides a reasonable estimation of individual LECs' inherent productivity variations from the 2.8 percent productivity offset factor at the time price caps began. Ameritech Comments at 14-15.

[331] Eagle Comments at 2; USTA Comments at 9; US West Comments at 8, 42; Pac Bell Comments at 43; Lincoln Comments at 11; NYNEX Comments at 28; GTE Comments at 67; Ameritech Comments at 14, 16; BellSouth Comments at 50; AT&T Comments at 30, 35-37; Bell Atlantic Comments at 9; Ameritech Reply at 8.

[332] Pac Bell Comments at 43; NYNEX Comments at 29-30; SWB Comments at 44-45; Ameritech Reply at 3; BellSouth Comments at 56; USTA Comments at 22, 46; Lincoln Comments at 11-12. But see CSE Comments at 6 (sharing and low-end adjustments mechanisms lower the variance of expected returns from equity investments in LECs and, therefore, artificially encourage over-investments in LECs).

[333] Lincoln Comments at 12; CSE Comments at 5-6; GTE Comments at 67; BellSouth Comments at 50; Bell Atlantic Reply at 10-13; Eagle Comments at 2.

and contends that regulatory symmetry dictates that these mechanisms be eliminated from the LEC price cap plan.[334] CSE argues that these backstop mechanisms were intended to be interim safeguards and not long-term features of the LEC price cap plan.[335]

174. Some commenters claim that elimination of the sharing mechanism will provide the LECs with the opportunity to earn a return commensurate with investment risks,[336] and will enhance the LECs' ability to attract capital from international sources.[337] USTA and SWB argue that sharing creates an incentive to cross-subsidize competitive services or to price those services below incremental costs. They point out that, if sharing is retained, the Commission will need to develop a series of cost allocation procedures for price cap versus non-price cap services to prevent cross-subsidization.[338]

175. A number of carriers, including SWB, attach to their comments a study conducted by Strategic Policy Research (SPR).[339] According to SPR, a four-year hybrid price cap plan with a 50-50 sharing mechanism has less than 35 percent of the efficiency incentives provided in an unregulated competitive market, and that these incentives fall to only 18 percent of the efficiency incentives of unregulated competition for a LEC whose earnings are in the 50-50 sharing zone each year.[340] Ad Hoc criticizes the SPR study because it assumes that an unregulated, competitive firm would be able to keep 100 percent of its efficiency gains indefinitely.[341] Ad Hoc also claims that SPR does not adequately account for the efficiency incentives created by the 1 percent no-sharing zone.[342]

176. Other commenters recommend retention of the sharing

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[334] GTE Reply at 16.

[335] CSE Comments at 5-6.

[336] Bell Atlantic Comments at 9; Lincoln Comments at 11.

[337] USTA Comments at 47.

[338] USTA Comments at 48-50; SWB Comments at 44-45.

[339] "Regulatory Reform for the Information Age," Strategic Policy Research, Bethesda, MD (January 1994) (SPR study).

[340] SWB Comments, Appendix SPR at 22-23.

[341] Ad Hoc Reply at 15-18.

[342] Ad Hoc Reply at 18.

and low-end adjustment mechanisms, contending that these mechanisms protect ratepayers and stockholders from unusual circumstances that may impact individual price cap LECs, while the sharing mechanism ensures that ratepayers fully participate in efficiency gains.[343] CCTA asserts that, because network technology, demand and competition levels are in a state of flux, uncertainty regarding the appropriate productivity factor may have increased.[344] PaOCA and GSA recommend that the Commission retain the 50 percent sharing mechanism, but eliminate the 100 percent sharing requirement; they argue that the 100 percent sharing requirement provides the carriers with perverse incentives to cease controlling costs once they reach the 16.5 percent earnings level.[345] GSA asserts the sharing feature could not have limited the incentive for LECs to invest and become more productive, given that the RHCs earned over a billion dollars more than their cost of capital in 1993.[346]

177. AT&T, MCI, and ICA recommend elimination of the low-end adjustment mechanism and retention of the sharing mechanism.[347] MCI says the low-end adjustment mechanism should be eliminated because the price cap plan already contains protections to guard against confiscatory rates.[348] ICA recommends replacing the low-end adjustment mechanism with an "earning sharing indexing scheme" under which a LEC would offset an "earnings sharing obligation in one tariff year with its foregone profits from a prior year."[349]

178. Ad Hoc asserts that, given existing market conditions, effectively replicating a competitive market requires earnings constraints on LECs. It contends that infrastructure development

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[343] CCTA Comments at 2; PaOCA Comments at 9; GSA Comments at 7; WilTel Comments at 25; Ad Hoc Comments at 24; see also CARE November 1994 Ex Parte Submission at 19 (recommending that the Commission retain the sharing mechanism because it provides insurance against excessive monopoly rates and constitutes the "[o]nly means to compensate ratepayers for LEC abuses of accounting and other rules").

[344] CCTA Reply at 26-27.

[345] PaOCA Comments at 10; GSA Comments at 7-8.

[346] GSA Reply at 10.

[347] AT&T Comments at 30, 35-37; MCI Comments at 32; ICA Comments at 14.

[348] MCI Comments at 32.

[349] ICA Comments at 14.

has proceeded apace under the current price cap regime and that earnings sharing is not inconsistent with a competitive market, because competing firms are in effect forced to "share" temporarily high earnings in order to survive in competitive markets.[350] Ad Hoc also argues that elimination of sharing under current conditions would be an unlawful abandonment of rate regulation, because it would violate Section 201 of the Communications Act by permitting LECs to set excessive rates, outside the range of reasonableness.[351]

179. MCI asserts that most LECs overstate fourth quarter expenses to manipulate their sharing obligations, and recommends requiring LECs to declare one-time accounting adjustments for the fourth quarter on or before September 15 of each year, and to file a justification and explanation of each adjustment, as well as its likely earnings impact.[352] In their replies, several LECs deny manipulating their earnings to undermine the sharing rules.[353] SWB says that company books and records are audited annually by independent external auditors and all booked expenses must meet GAAP accounting standards.[354] GTE argues that MCI's proposal that LECs declare all fourth quarter accounting adjustments by September assumes that all such adjustments would be known in advance and requires potential release of proprietary information.[355] NYNEX notes that the Commission has rejected arguments that it should look behind a LEC's reported earnings to decide whether a particular cost should be counted for purposes of applying the low-end or sharing adjustment mechanisms.[356]

180. In their comments filed in response to USTA's January 18 proposal, a number of LECs contend that the moving average allows the Commission to remove the sharing and low-end adjustment mechanisms, which they believe counteract the

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[350] Ad Hoc Reply at 10-13.

[351] Ad Hoc Reply at 19-21.

[352] MCI Comments at 32-34 & nn.55, 56.

[353] USTA Comments at 16-17; GTE Reply at 20; SWB Comments at 20-22; Pac Bell Reply at 14-16.

[354] SWB Reply at 21.

[355] GTE Reply at 22.

[356] NYNEX Reply at 67-68, citing 1992 Annual Access Tariff Filings, CC Docket No. 92-141, 7 FCC Rcd 4731, 4735 (Com. Car. Bur. 1992).

incentives of price cap regulation.[357] Pac Bell argues that sharing requires burdensome review of costs and earnings.[358] Pac Bell also alleges that IXCs rarely pass through the benefits of sharing to their ratepayers.[359] MCI and AT&T deny that the moving average justifies elimination of sharing.[360] GSA maintains that the sharing and low-end adjustment mechanisms are necessary regardless of level of X-Factor, to adjust for yearly fluctuations in earnings.[361]

**b. Realigning the Backstop Mechanisms With Capital Costs**

181. Many commenters urge the Commission not to realign the sharing and low-end adjustment mechanisms to reflect changes in capital costs.[362] Several parties contend that the Commission is legally precluded from prescribing a new LEC rate of return in this proceeding.[363] BellSouth and Sprint argue that it would be unreasonable for the Commission to initiate a proceeding to represcribe the cost of capital applicable to price cap LECs when it has retained 11.25 percent as the cost of capital applicable to AT&T price caps and cable television providers.[364] BellSouth and Pac Bell contend that changes in interest rates are already reflected in the GNP-PI component of the price cap adjustment formula.[365] Pac Bell says that adjustments to rate of return

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[357] Pac Bell January 18 Comments at 1-2; NYNEX January 18 Comments at 2 and Attachment; US West January 18 Comments at 2-3; SWB January 18 Comments at 6-7, 9-10.

[358] Pac Bell January 18 Comments at 2-3.

[359] Pac Bell January 18 Comments at 3.

[360] MCI January 18 Comments at 6-7; AT&T January 18 Comments at 7-8.

[361] GSA January 18 Comments at 4-5.

[362] NYNEX Comments at 32; BellSouth Comments at 47; Pac Bell Comments at 44; SWB Reply at 8; Sprint Reply at 20-22; USTA Reply at 7-8.

[363] USTA Reply at 12; BellSouth Comments at 48; Pac Bell Reply at 8-9; NYNEX Comments at 35 n.85.

[364] Sprint Comments at 20-24; BellSouth Comments at 47-48, citing Implementation of Sections of the Cable Television Consumer Protection Act of 1992, MM Docket No. 93-215 and CS Docket No. 94-28, 9 FCC Rcd 4527, 4634-35 (1994).

[365] BellSouth Comments at 49; Pac Bell Comments at 45.

have no place in a price cap form of regulation where the goal is to control prices and not individual endogenous costs.[366] Sprint contends that there is no need to revisit the rate of return because the recent changes in cost of debt have been short-term.[367] Pac Bell states that current long-term interest rates have changed very little since the LEC rate of return was last represcribed.[368] Some LECs assert that the Commission has declined in the past to adjust the cost of capital solely based on fluctuations in interest rates.[369]

182. On the other hand, AT&T recommends that the benchmark rate of return used for setting the sharing and low-end adjustment triggers should be reset downward to reflect the decline in capital costs.[370] AT&T says that, between 1991 and 1993, the LECs' cost of capital averaged no higher than 9.93 percent. AT&T therefore recommends that, because the LECs' cost of capital during this period was 132 basis points lower than the current 11.25 percent rate-of-return threshold, the sharing and low-end thresholds should be reduced by 132 basis points.[371] MCI recommends that the sharing and low-end adjustment ranges should be adjusted downward to reflect the current cost of capital which, according to MCI, is 9.54 percent.[372] Specifically, MCI recommends that the low-end adjustment threshold be set at 8.54 percent, and the 50 and 100 percent sharing thresholds at 10.54 and 14.54 percent, respectively.[373] Based on findings of the California Public Utilities Commission regarding Pac Bell's intrastate price cap regulation, CCTA advocates basing the

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[366] Pac Bell Reply at 8-9; USTA Reply at 7-8.

[367] Sprint Reply at 21.

[368] Pac Bell Comments at 44.

[369] BellSouth Comments at 48, citing Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, 6 FCC Rcd 7193, 7201 (1991) (Represcription Reconsideration Order); NYNEX Comments at 33, citing Represcription Order, 5 FCC Rcd at 7527; see also NYNEX Comments at 33-34 (cost of capital based on both interest rate and cost of equity, and increased competition may increase costs of equity).

[370] AT&T Comments at 3; GSA Comments at 7; OCCO Comments at 9; Ad Hoc Comments at 25; ARI Comments at 2-3.

[371] AT&T Comments at 33-34.

[372] MCI Comments at 30; accord CCTA Reply at 10-13.

[373] MCI Comments at 30.

backstop mechanisms on a 10.00 percent rate of return.[374]

183. USTA, Pac Bell, and Sprint assert that the cost-of-capital calculations of AT&T and MCI are seriously flawed and do not support their recommendations for a sharing mechanism based on a lower rate of return.[375] These reply commenters assert that, contrary to claims of AT&T and MCI, the LECs' current cost of capital is between 11.64 percent and 11.82 percent.[376] USTA asserts that MCI improperly based its analysis on aggregated Regional Holding Company data rather than data based on individual Bell Operating Companies. According to USTA, results based on Regional Holding Company data reflect the impact of the capital structures of their unregulated businesses.[377] USTA claims that AT&T's historical analysis makes the same error as MCI's analysis, and that, in any case, the analysis is not relevant because it focuses only on data from 1991 to 1993.[378] Sprint argues that the LECs' prescribed rate of return tends to overstate their earnings, because the economic life of much LEC equipment is less than that reflected in depreciation rates prescribed by the Commission.[379]

### 3. Analysis

184. We tentatively hold that the sharing and low-end adjustment mechanisms should be eliminated as part of our new permanent price cap plan for LECs selecting a higher X-Factor. Consistent with our tentative finding that our plan should have at least two X-Factor options, we tentatively conclude that at least one option should be a pure price cap plan, with no sharing or low-end adjustment mechanism, and at least one of the lower options should feature sharing and a low-end adjustment mechanism. If we ultimately adopt a price cap plan that incorporates a moving average X-Factor, the ongoing routine updating of the X-Factor should provide reasonable rates to customers, including more complete flow-through of LEC efficiency gains, while enhancing the efficiency incentives of the plan and simplifying its administration. We will seek comments on these

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[374] CCTA Reply at 10-11.

[375] USTA Reply at 12; Sprint Reply at 25; Pac Bell Reply at 9-12.

[376] USTA Reply at 12; Sprint Reply at 25; Pac Bell Reply at 9-12.

[377] USTA Reply at 13-14 and Attachment 2 at 10-12.

[378] USTA Reply at 14-15.

[379] Sprint Reply at 24.

tentative conclusions in the further notice.

185. The purpose of the backstop mechanisms was to help ensure that LEC price cap rates remained reasonable in the event that the X-Factor was in error for the industry as a whole or, as a result of variations across the industry, for individual LECs. If the X-Factor was set too high or too low, the backstop sharing and low-end mechanisms would help to adjust the price cap indexes to correct the error. If the productivity growth of an individual LEC varied substantially from the industry average, the backstop helped keep its rates within a range of reasonableness.

186. In addition, the backstop sharing mechanisms served as an incentive for LECs to choose a higher X-Factor. The 1990 plan contained gradations in sharing, with somewhat more lenient sharing zones for the higher, optional 4.3 X-Factor. The plan thus sought to encourage LECs, through the prospect of retaining higher earnings, to accept the more challenging 4.3 X-Factor. This, in turn, would lead to rate reductions for consumers beyond those required by the lower 3.3 X-Factor. In this manner, the gradations in sharing for the two X-Factors "embod[ied] the concept of providing a profit incentive to LECs to further reduce rates."[380]

187. At the same time, we recognized that these mechanisms have drawbacks. By reducing the risks and rewards of LEC efforts and decisions, the backstop blunts the incentives for greater productivity that price caps seeks to create. These reduced incentives can be expected to generate lower LEC efficiency, which in turn would reduce the benefits of price caps to consumer welfare and the health of the national economy. The increased burdens of administering a price cap plan with the added complexities and regulatory burdens of a rate-of-return backstop represents a further loss to society. In addition, because these mechanisms are rate of return mechanisms, they create an incentive for cross-subsidization between regulated and nonregulated activities.

188. We remain convinced that a rate-of-return backstop reduces the efficiency incentives that can be generated by a pure price cap plan. The evidence in the current record lends further support to this conclusion. As noted above, the SPR study of the effects on incentives of the current sharing mechanism and four year review cycle finds that the current LEC price cap plan produces less than 35 percent of the efficiency incentives of unregulated competition, and that these incentives fall to only 18 percent for a LEC whose earnings are in the 50-50 sharing zone each year. As Ad Hoc points out, this study may overstate the

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[380] LEC Price Cap Order, 5 FCC Rcd at 6801.

effect on possible incentives,[381] but even Ad Hoc's revised estimates indicate that the current backstop substantially reduces the efficiency incentives of the plan. Ad Hoc's estimates indicate that a pure price cap plan produces 86 percent of the efficiency incentives of unregulated competition, and that the sharing and the four-year review cycle reduce efficiency incentives to 69 percent of those experienced by competitive firms, and to 45 percent for firms in 50-50 sharing. Even by this more conservative calculation, ending sharing would thus generate at a minimum a 17 percent (86 percent minus 69 percent) increase in efficiency incentives for all LECs, and a 41 percent (86 percent minus 45 percent) increase for LECs in 50-50 sharing,[382] a category that currently includes most price cap LECs. These are substantial gains in incentives that the current plan suppresses. And, of course, eliminating the 100 percent sharing zone in the current plan would eliminate the possibility that a LEC that achieved high interstate earnings would have no incentives to increase efficiency.

189. A pure price cap plan, without earnings sharing, may also encourage infrastructure development and the deployment of advanced equipment and technology. Ameritech submitted a study that compares state regulatory experiences and concludes that incentive regulation generated faster deployment of modern equipment and technologies, but that earnings sharing dilutes the incentives to make infrastructure improvements.[383] This study, however, does not control for the effect of state-mandated investment requirements or agreements between state commissions and LECs that require the LECs to deploy advanced infrastructure,

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[381] Ad Hoc criticizes the SPR study for assuming that competitive firms retain all the benefits of efficiency gains in the form of higher profits indefinitely, even though such gains would be transitory as competing firms emulate such improvements. Ad Hoc also adjusts the SPR study's assumption that LECs will share 50 percent of high earnings, based on the fact that during the first few years of LEC price caps, the backstop mechanism's no-sharing zone reduced actual LEC sharing to only 20 percent of profits above the initial 11.25 percent rate-of-return target. Ad Hoc also assumes that a price cap LEC will face a periodic review every four years. SPR estimates that the possible threat to earnings of the periodic review reduces LEC incentives by 14 percent, compared to a competitive firm that would not face the risk of regulatory action that might reduce the profits of long term investments. Ad Hoc Reply at 16.

[382] See Ad Hoc Reply at 16.

[383] The Effect of Incentive Regulation on Local Exchange Companies' Deployment of Digital Infrastructure, Ameritech Reply at Attachment B (Ameritech/Greenstein-McMaster-Spiller Study).

even though these are common features of state price cap and social contract plans. Because it is not possible to replicate the study and control for this effect, the study's conclusions are open to question.

190. The backstop, even with its reductions in efficiency incentives, was reasonable during the initial price cap period, when we could not be certain that the X-Factors we had selected would be accurate for the price cap LECs in general or for individual LECs. Now, after four years of experience with LEC price caps, we are in a much better position to set reasonable X-Factors, using actual LEC performance data under price cap regulation. We no longer have to estimate their prospective performance under price caps. Thus, the need for a backstop to correct possible errors in the overall industry X-Factor is reduced, although not eliminated.

191. We believe that the record developed in this proceeding shows that the sharing mechanism deprives LECs and their customers of the full benefits of lower prices and improved efficiency that a pure price cap scheme can offer. We further believe that the performance of the LECs over the past four years of price cap regulation provides us with more reliable and accurate information with respect to the efficiency gains that LECs reasonably can be expected to achieve annually. Moreover, a price cap plan that provides for annual updates to the X-Factor on the basis of a moving average would ensure that the X-Factor reflects the actual performance of the LECs on a more timely basis. As a result, continuing gains in the average efficiency of the LECs' provision of regulated interstate access services would eventually be passed through to their customers.

192. If the methodology used to set the moving average is properly selected and applied, the X-Factor would be automatically adjusted each year for any increases or decreases in overall LEC performance, including changes in productivity, after whatever lag period is selected. Thus, the danger of an error in the X-Factor leading to unreasonably high or low rates is reduced substantially, if not eliminated.[384] A backstop to make these same corrections would be superfluous.

193. In sum, we believe that our long-term price cap plan should not require the continuation of sharing in order to ensure that the X-Factor represents an accurate measure of average annual LEC efficiency gains under price caps. We are mindful, however, that the sharing and low-end adjustment mechanisms were

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[384] If we find at the conclusion of our further proceeding that error in the X-Factor cannot be eliminated, we will there set an appropriate mechanism to deal with the possibility of unreasonably high or low rates due to such error.

also intended to account for variations in the performances of individual LECs. We observed in the LEC Price Cap Order that "[i]ndividual LECs may experience significant variations from the industry productivity norm, not because of their own foresight and efforts but as a result of regional economic booms or recessions, among other factors."[385] The data obtained from the initial period of price cap regulation indicate that the efficiency gains that individual LECs have been able to sustain, as measured by their interstate earnings, have indeed varied significantly. In each year under price caps, the range of earnings of the LECs has spanned several hundred basis points. Some of the LECs have achieved efficiency gains that placed them in the sharing zones every year, while others have lagged significantly behind.[386] We note that USTA asks us to take these differences into account in any revised price cap plan by preserving the current lower X-Factor of 3.3 percent for LECs that are unable to maintain the industry-wide average rate of growth in efficiency.[387] We recognize that these differences among the price cap LECs may be attributable to differences in their responses to the incentives created by this scheme of regulation to improve their efficiency in providing their regulated services. We also recognize that in some cases these differences may be caused by factors over which the LECs have no control, such as the strength of the regional or local economies in the areas in which a LEC provides service. Since at this time we are unable to isolate the factors that contributed to a particular LEC's performance, the precise cause of the variations among companies is less important than the fact that the heterogeneity exists.

194. We tentatively concluded above that our long-term price cap plan should provide more than one X-Factor option in recognition of the differences in the LECs' performance. This structure, however, does not inherently create incentives for a LEC to select an X-Factor that most closely corresponds to its actual rate of efficiency gain. If we were to establish a price cap scheme with multiple X-Factor options, without some mechanism to require LECs deciding which option to select to weigh a trade-off associated with the lower options, it is patently obvious that every LEC, regardless of its actual productivity rate, would select the lowest option. That result clearly would not serve the public interest. USTA suggests that we can solve their "self-selection" problem by maintaining the current 3.3 percent

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[385] LEC Price Cap Order, 5 FCC Rcd at 6801.

[386] Appendix C, Table 5, lists the interstate earnings reported by the price cap LECs for 1991-1993 as well as their estimated earnings for 1994.

[387] See January 18 Letter.

X-Factor with the existing backstop mechanisms as an option only for smaller LECs that elected price cap regulation voluntarily. This could be fair and appropriate, USTA argues, because these carriers "are uncertain of their ability to achieve the scope and scale necessary to sustain productivity gains year after year in line with the industry average."[388] USTA, however, presents no specific evidence to support its assertion regarding the performance characteristics of the independent LECs that voluntarily elected price caps.

195. Because of the "self-selection" problem created by a price cap system that, in recognizing LEC heterogeneity, offers more than one X-Factor option, it is necessary to build into the system incentives for a LEC to opt for the X-Factor that most closely corresponds to the LEC's actual efficiency growth. That is to say, the price cap scheme should encourage a LEC with a lower rate of efficiency growth to select a lower X-Factor and encourage a more productive LEC to select a higher X-Factor.

196. One way to create these incentives is through the current sharing arrangements. Assume, for example, that a LEC's rate of productivity growth actually exceeds all of the X-Factor options offered under a price cap plan. Assume further that the price cap scheme allows the LEC to retain substantial earnings if it elects a lower X-Factor and greater earnings if it elects a higher factor. The sharing obligations associated with each of the factors would largely dictate the LEC's choice, since the LEC would have to decide whether the opportunity to retain a greater level of earnings at the higher option would offset the additional reduction in its PCI that the LEC would incur by selecting the higher option. Indeed, in an ex parte filing, Sprint proposed an approach with three X-Factors in which the sharing arrangement became more flexible as the X-Factor increased, with the highest X-Factor having no sharing.

197. We have discussed above the significant drawbacks of continuing to impose sharing in our price cap regulatory scheme. Accordingly, we tentatively conclude that the existing backstop mechanisms should eventually be eliminated and we should move to a system of pure price caps. Further, we would like to explore alternatives to the use of sharing to create the proper incentives for LECs to select an X-Factor that corresponds to their actual, internal X-Factor. We will seek comment on this issue in the next phase of this proceeding. In any event, if we eventually conclude some system of alternative X-Factors should be adopted, we believe that one of the options should be a pure price cap plan, with no backstop mechanisms.

**D. Adjustments to the Current Plan**

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[388] January 18 Letter at 5.

198. We expect to complete this proceeding expeditiously and establish a long-term method for setting the X-Factors based on the LECs' actual performance under price caps. There remains the question whether interim adjustments to the current plan are necessary to ensure that rates remain just and reasonable, and that a reasonable balance between ratepayer and shareholder interests is achieved, during the time it will take to develop a new rate formula.

199. We are persuaded, based on the record before us, that our original X-Factors should be adjusted upward to correct for an error in our original estimate of the historical X-Factor for the period 1984-90. A simple upward adjustment would produce corrected X-Factors of 4.0 and 5.0. We also find, however, that, in light of the demonstrated heterogeneity of the LEC industry, the range of evidence in the record concerning LEC performance under price caps, and our present inability, absent further specific information, to reach definitive decisions based upon that evidence, a wider range of X-Factors is warranted to achieve an appropriate balance of interests for each LEC during this interim period. We therefore establish for this period a minimum X-Factor of 4.0 percent and two optional X-Factors of 4.7 and 5.3.

200. LECs selecting the highest X-Factor will not be subject to sharing, nor will they be permitted to make low-end adjustments. LECs choosing an X-Factor of 4.7 will be allowed to keep all earnings up to 12.25 percent, will be required to share half of their earnings from 12.25 percent to 16.25 percent, and will be required to share all of their earnings above 16.25 percent. LECs selecting the lowest X-Factor option will keep earnings up to 12.25 percent, share half of earnings from 12.25 percent to 13.25 percent, and share all earnings above 13.25 percent. These sharing zones are designed to encourage each LEC to elect the X-Factor that is closest to the X-Factor it is likely to achieve, and to discourage LECs with higher productivity from selecting the lower X-Factors. We retain the current low-end adjustment mechanism for those choosing the two lower X-Factors.

### 1. Correction of the Original X-Factor Analysis

201. In the LEC Price Cap Order the Commission selected a baseline productivity factor of 2.8 percent, based on the results of two studies conducted by the Commission staff. The Frentrup-Uretsky short-term study examined LEC switched access rates in the tariff years 1984-1990 and produced a productivity factor of 3.5 percent. The Spavins-Lande long-term study derived a productivity factor of 2.1 percent from telephone industry price data during the period 1928-1989. The Commission developed a factor of 2.8 percent, based on the average of the results of

these two studies, characterizing this choice as a "conservative minimum figure."[389] A 0.5 percent CPD was added, so that the total productivity offset became 3.3 percent.

202. Although the Commission concluded at the time that it had been conservative in its selection of a baseline productivity figure, it also viewed the price cap plan as a whole, including the CPD and the 50-50 common line formula, as presenting a significant productivity challenge to LECs seeking higher earnings.[390] Evidence now on the record, however, indicates that the productivity hurdle was not as challenging as the Commission anticipated.

203. LEC earnings have risen rapidly during the initial price caps period, to the point where, in 1993, all seven BOCs, Contel, Lincoln, and a number of Sprint operating companies were in the 50-50 sharing zone.[391] Earnings for 1994 also appear high, with preliminary reports showing five BOCs, Lincoln, and most Sprint companies in the 50-50 zone, and several Sprint companies at or near the 100 percent sharing mark.[392] We agree with MCI and others who argue that the earnings achieved by LECs under price caps suggest that the productivity offset may have been too low, resulting in a price cap plan that was not as challenging as the Commission intended it to be. In our original conception, sharing was not intended or foreseen to be a routine occurrence. Rather, we consistently described sharing as a backstop mechanism, in the event that unanticipated errors in the price cap formula, or circumstances peculiar to a particular company, rendered the formula inaccurate for a company at a given time.[393] Indeed, we did not believe that any carrier would reach the 100 percent sharing level during the first four years of price caps, and that such a rise would more likely indicate an error in the factor or an unusual variation from the industry norm than newly-achieved productivity.[394] The fact that sharing has become routine for most price cap LECs indicates to us that we should reexamine our original productivity factor to determine if we made an error in its specification. Moreover, even assuming arguendo that the LECs are correct that interstate

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[389] LEC Price Cap Order, 5 FCC Rcd at 6798.

[390] Id. at 6799, 6801.

[391] Letter from Mary McDermott, USTA, to Acting Secretary, March 14, 1995 (USTA March 14 Letter).

[392] Id.

[393] LEC Price Cap Order, 5 FCC Rcd at 6801.

[394] Id. at 6804.

earnings, based on regulatory accounting and separations rules, do not reflect economic costs, it is significant that LEC earnings have increased each year under price caps.

204. New evidence submitted in this docket confirms the need to reassess our previous determinations with respect to historical LEC productivity. The USTA TFP study provides new productivity data for the 1984-1990 period covered by the Frentrup-Uretsky Study. As explained in Appendix F to this order, the results of the USTA Study must be adjusted to account for input price differentials during the period covered by the study.[395] When so adjusted, the USTA Study indicates that LEC productivity growth rates for the years 1984-1990 were significantly higher than the Frentrup-Uretsky results for the same period. Accordingly, we have re-examined the Frentrup-Uretsky Study to see what might account for this difference.

205. As MCI notes in its comments, there was considerable controversy concerning our decision to include in the Frentrup-Uretsky Study the access price data from the 1984-85 tariff year (the "1984 data point").[396] This data point was, perhaps, the single most contentious aspect of our productivity analysis. Statistical analyses showed this data point to be an outlier.[397] Even after several adjustments, the data point did not fit the trend described by the 1985-90 data.[398] Nevertheless, the Commission ultimately decided out of an abundance of caution that the disputed data point provided relevant information and should be included in order to give the most complete possible picture of post-divestiture productivity.[399] Although the Commission exercised its best judgment in reaching this decision, the decision was not compelled by the evidence. Indeed, it appears that the record would have afforded the Commission discretion to have excluded the data point as well. The inclusion of the 1984 data point, therefore, appears to be a likely source of error in the Frentrup-Uretsky results. For the reasons set forth below, based on the record developed in this proceeding, that exclusion of the 1984 data point will provide a more reliable measure of LEC productivity in the immediate post-divestiture period.

206. The Common Carrier Bureau staff has performed an

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[395] See Appendix F, infra.

[396] See LEC Price Cap Order, 5 FCC Rcd at 6797 and Appendix C at 6892-94.

[397] LEC Price Cap Order, Appendix C, 5 FCC Rcd at 6892-94.

[398] LEC Price Cap Order, Appendix C, 5 FCC Rcd at 6892-94.

[399] LEC Price Cap Order, 5 FCC Rcd at 6797.

analysis to determine what X-Factor the Frentrup-Uretsky Study would have produced had the 1984 data point been excluded. This study is reported in Appendix D of this Order. The revised Frentrup-Uretsky Study shows that, without the 1984 data point, the short-term historical X-Factor would have been 5.0 percent.

207. As noted above, the USTA TFP Study, adjusted for input price differential, produced a productivity figure around 4.8 percent for the period 1985-1990. The USTA data thus corroborate, in a general way, the range produced by the revised Frentrup-Uretsky Study, supporting the argument that the 1984 data point should have been excluded from the original study. We also observe that, unlike the Frentrup-Uretsky Study, the USTA Study does not show disparate results for the periods 1984-90 and 1985-90. If LEC productivity gain in the 1984-85 tariff year were really as different from the subsequent five years as the 1984 data point would indicate, that difference should have shown up in USTA's TFP Study. The fact that the USTA TFP Study results are not much affected by the inclusion or exclusion of 1984-85 data lends additional credence to the view that the data underlying the 1984 data point in the Frentrup-Uretsky Study was seriously flawed.

208. We now conclude that we erred in 1990 and that the 1984 data point should have been excluded from the Frentrup-Uretsky Study. We base this conclusion on (1) the statistical critique presented in the LEC Price Cap proceeding, which demonstrated that the data point was an outlier; (2) the new evidence of the adjusted USTA TFP Study showing LEC productivity during the period 1984-90 to have been much higher than was shown by the Frentrup-Uretsky Study; (3) the fact that elimination of the 1984 data point from the Frentrup-Uretsky Study brings the study into line with the USTA TFP results (once corrected for input price differential); and (4) the evidence from the USTA TFP Study indicating that productivity for the year 1984-85 was not, in fact, anomalous if correctly measured. Our conclusion is supported by the observation of a rapid rise in LEC earnings under price caps, which suggests that the productivity factor used during the initial price caps period was too low.

209. In the LEC Price Cap Order, we averaged the 3.5 percent factor from the short-term Frentrup-Uretsky Study with the 2.1 percent factor from the long-term Spavins-Lande Study to compute an average of 2.8 percent. The 0.5 percent CPD was then added to set the minimum X-Factor of 3.3 percent. Based on the additional information in the current record, and for the reasons described above we conclude that the short-term study should be corrected to exclude the controversial 1984 data point. This results in a corrected short-term study factor of 5.0 percent. Consistent with our methodology for computing the X-Factor in 1990, when this is averaged with the result of the long-term study, the new average is 3.5 percent. Adding the 0.5 percent

CPD would produce a minimum X-Factor of 4.0 percent. Thus, correcting our prior error in 1990 and, employing the same averaging methodology, leads to a calculation that 4.0 percent is a more accurate measure of LEC productivity and a more appropriate minimum X-Factor for our revised price cap plan.

**2. Selection of New X-Factors**

210. In the LEC Price Cap Order we selected an X-Factor of 3.3 percent in the manner described above, then added 1 percent to create a higher, optional X-Factor of 4.3 percent. Carriers selecting the higher X-Factor were allowed a wider, 200 basis point no-sharing zone, but were still subject to sharing obligations. If we were simply to make the mathematical adjustment to our existing plan, we would now set a minimum X-Factor at 4.0 and a higher, optional X-Factor at 5.0.

211. The record before us, however, provides several reasons why we should not simply mathematically adjust the existing plan, but rather should make other adjustments as well. First, as discussed in the previous section of this Order, we have found that, assuming an appropriate X-Factor could be chosen, a price cap plan without sharing would be better than a plan with sharing. We find, therefore, that our interim plan should include an X-Factor option without sharing. This approach represents a cautious, but still significant, step toward our tentative conclusion that sharing should be eliminated at the earliest feasible opportunity.

212. Second, few LECs chose the 4.3 percent X-Factor, although a number of companies experienced high earnings several years in a row and were repeatedly required to return a portion of those earnings to ratepayers through sharing. This experience suggests that the LECs perceived the risk involved in accepting a permanent one percent reduction in the PCI to have been too large in comparison to the reward that was offered, i.e., the opportunity to earn for one year an interstate rate of return of up to 13.25 percent without sharing and up to 15.25 percent, net of sharing. We believe that carriers may be more likely to choose X-Factors above the minimum level if the interval between options is somewhat smaller than one percent, and the difference in sharing zones between options is greater.[400] These two changes, acting in tandem, can lead to a wider gap in the effective rate of return permitted under the various options. The opportunity to earn a higher rate of return would create a greater economic incentive for LECs to aspire to the higher X-Factors available under the new plan. By creating profit incentives for LECs to opt for the higher X-Factors, we seek to further two goals -- greater rate reductions for consumers of

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[400] See Section IV.D.3, infra.

those LECs that move up from the minimum 4.0 X-Factor; and moving carriers toward a "pure" price cap option with no sharing, consistent with our long-term goals on this issue.

213. Third, as discussed in the preceding section of the order, the price cap LECs now appear to display significantly greater heterogeneity than under rate of return regulation. Some have required low-end adjustments, while others have been in the sharing zone every year. The wide range of earnings results indicates that some LECs may be sufficiently challenged by an increase in the minimum X-Factor from 3.3 to 4.0, some might experience high earnings at 5.0, and others may fall somewhere in between. In light of this diversity, we conclude that our interim plan should offer three X-Factor options, structured so that each LEC is likely to choose the option that is closest to its own implicit X-Factor. In this way a better balance of ratepayer and shareholder interests will be achieved for each LEC and its customers.

214. Accordingly, instead of setting one optional X-Factor at 5.0, we will establish two optional X-Factors at equal intervals above and below that level. The optional X-Factors will thus be 4.7 and 5.3, with a minimum X-Factor of 4.0. We believe these optional X-Factors, with narrower gaps between the options and coupled with the sharing zones discussed below, will encourage LECs to become more productive and efficient, so that customers benefit from lower prices and innovative services. We recognize that there are alternative optional X-Factors that we could have selected for this interim period. The ratemaking process, however, is "not an exact science."[401] Rather, it involves making predictive judgments about the future, and requires us to exercise our expertise and informed judgment in balancing the interests of consumers and shareholders. We believe the plan we adopt here strikes an appropriate balance among the relevant public interest factors, particularly given the interim nature of the plan.

215. Thus, to summarize, the benefits of moving from two to three options are, first, that three options offer LECs a greater number of choices, and thus better reflect the heterogeneity of past performance and choices among LECs. Second, three options provide carriers greater flexibility. Third, the middle option provides LECs an additional opportunity to move away from the minimum X-Factor to a higher step, offering greater earnings opportunities in return for a larger up-front reduction in a LEC's PCIs and leading to reduced rates for consumers. Finally, the revised plan encourages continued movement away from rate-of-return regulation, as the highest option eliminates the sharing

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[401] United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983).

obligation and provides incentives for higher productivity levels.

216. We reject MCI's proposal that we rely solely on the corrected short-term study to set a minimum X-Factor. As we recognized in setting the initial minimum X-Factor, the short-term and long-term studies each have strengths and limitations.[402] The short-term study's strengths include its focus on data on the post-divestiture performance of the LECs under rate of return regulation, including performance under this Commission's switched access rules. Its weaknesses, however, are significant. The study includes only a few data points and those points reflect a period of expansion, without a recession or downturn, and so represent only one part of a business cycle. The study does not include special access, and requires numerous complex adjustments[403] for events since divestiture, each of which has the potential to introduce errors in the result. As we have seen, this result is also highly sensitive to data from a single year. The long-term study has, comparatively, the important strength of perspective, based on a longer series of data from a range of economic conditions and technologies. The long-term study's result is also consistent with other telephone productivity studies submitted in the original record.[404] Its weaknesses include its lack of adjustment for cost changes since divestiture or for changes in profits over time, as well as its heavy weighting toward pre-divestiture Bell System data. We remain convinced that both studies provide useful information on historical LEC productivity, and that we should continue to make use of both studies in establishing interim X-Factors, pending the completion of the further rulemaking to set a permanent X-Factor methodology.

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[402] LEC Price Cap Order, 5 FCC Rcd at 6798.

[403] Such adjustments include: (1) the transition of the subscriber plant factor to 25 percent; (2) the revised separations treatment of local commercial operations expense; (3) the direct assignment of closed-end WATS access lines to the special access category; (4) the implementation of reserve deficiency amortizations to compensate for inadequate depreciation levels; (5) the effects of the 1986 Tax Reform Act; (6) the revised separations calculation of the dial equipment minutes (DEM) factor; (7) the revised separations treatment of central office equipment category 4 terminations; (8) the revised separations treatment of revenue accounting expenses; (9) the adoption of the new Part 32 Uniform System of Accounts, including conformance of Parts 36 and 69 of the Rules to Part 32; and (10) the revised treatment of pension expenses. See LEC Price Cap Order, Appendix C, 5 FCC Rcd at 6887.

[404] Id., 5 FCC Rcd at 6798.

217. None of the other commenters discussing LEC productivity has submitted independent evidence sufficient to enable us to adopt their recommendations at this time. Many parties base their arguments on AT&T's studies, or studies submitted by other parties. As explained above, we need to seek further comment before we can determine whether to adopt an X-Factor methodology based USTA's TFP methodology, AT&T's proposal, or some other methodology. In any case, no other parties submitted detailed studies or analyses comparable to those submitted by USTA or AT&T that would support adoption of their recommendations. Furthermore, we find that the 5.29 percent productivity factor developed by the panel of Pennsylvania PUC administrative law judges cited by ARI and PaOCA, although relevant in an examination of Pennsylvania intrastate rates, cannot by itself support a productivity factor for nationwide interstate access rates. In sum, we will not consider further these other X-Factor recommendations at this time.

### 3. Sharing Zones

218. The primary function of sharing during the first four years of price caps has been as a backstop to the price cap plan. As noted above, however, varying the sharing zones for the original two X-Factor options provided profit incentives for LECs to consider opting for the higher 4.3 percent X-Factor.[405] Most LECs in most years selected the 3.3 X-Factor, which represented our best estimate of the average productivity offset for the industry, and the sharing mechanism kept the rates charged by the most efficient companies within the prescribed zone.

219. As discussed in Section C, above, sharing zones can serve another purpose in a plan with multiple X-Factor options. Sharing requirements can be established so as to dissuade carriers from selecting options lower than their own actual X-Factors. Although we would prefer in the long-term to find some other method of encouraging each LEC towards the highest X-Factor, and thus the lowest rates, it can sustain, the record to date in this proceeding is insufficient to enable us to determine whether any substitute would have the same efficacy. We will, therefore, set the sharing zones in our interim plan so as to provide incentives for carriers to select appropriate X-Factors. As noted above, we seek to structure sharing zones to provide for greater rate reductions and to move carriers toward a pure price cap option.

220. LECs selecting the highest X-Factor, 5.3, will not be subject to sharing. This X-Factor is two percentage points above the current X-Factor that most LECs have selected and 1.3 percentage points above the minimum X-Factor in our interim plan.

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[405] See LEC Price Cap Order, 5 FCC Rcd at 6801.

Hence, we believe that this X-Factor represents a major challenge over the short period of time that this interim plan will be in effect. Nonetheless, we believe that the opportunity to retain all profits earned may attract the most efficient LECs to this option.

221. LECs choosing the 4.7 X-Factor will be subject to the same sharing requirements that attach to the minimum X-Factor in the original plan: they must share with ratepayers half of their earnings from 12.25 percent to 16.25 percent, and must return to ratepayers all earnings above 16.25 percent. While this X-Factor will be challenging, the performance of the industry to date under price caps indicates that the LECs have responded to the incentives created by this system by increasing their annual rate of efficiency gains. Thus we believe that many LECs can achieve the productivity growth implied by this X-Factor.[406] Moreover, carriers electing this option will have an opportunity to earn a return of up to 14.25 percent on their interstate investment base. In our view, these sharing bands create a reasonable incentive for certain LECs to elect this option, but the potential sharing obligations should discourage more efficient LECs from choosing this option if they can offset the higher 5.3 percent X-Factor by increasing the efficiency of their operations.

222. Those LECs that choose the lowest X-Factor will be subject to a significantly more restrictive sharing obligation. They will be required to share half of their earnings from 12.25 percent to 13.25 percent, and will be required to return all earnings above 13.25 percent. These sharing zones are intended to serve two purposes. For LECs that have lagged behind other LECs in their performance under price caps, for whatever reason, this minimum X-Factor establishes a conservative offset, since it is based on LEC performance data from cost-of-service years. Presumably, LECs facing such circumstances are not likely to earn high returns, and thus should incur few, if any, sharing obligations, despite the more stringent sharing zone. Further, for LECs that are able to achieve higher productivity gains, the narrow sharing zones should discourage such LECs from electing this option. Rather, the opportunity to retain a greater share of their earnings should encourage these LECs to select one of the higher options.

223. We have decided to retain for this interim period the low-end adjustment mechanism for LECs electing the 4.0 or 4.7 percent X-Factor. The other protections against confiscatory

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[406] Indeed, while we have previously stated that the Frentrup-Uretsky short-term study should not be the sole basis for determining the X-Factor, we believe it generally shows that this X-Factor is within the reach of some LECs.

rates cited by MCI, an above-cap tariff filing and a petition for waiver of the price cap rules,[407] are, potentially, burdensome to the Commission, LECs, and customers alike. Our cost support standards for above-cap filings are extensive and rigorous,[408] and we anticipate that any above-cap tariff filing would be suspended for the full five-month statutory period and subject to a lengthy investigation.[409] We continue to find it both fair and prudent, for this interim period, to provide for a measure of automatic relief for LECs experiencing low earnings. In this way we hope to avoid both confiscatory rates and extended rate proceedings. Furthermore, it may not be reasonable to require sharing when LECs experience high earnings without allowing a low-end adjustment when those LECs experience low earnings.[410]

224. We adopt the three interim X-Factors and their associated sharing and adjustment rules pursuant to our general rulemaking authority under Sections 4(i) and 201-203 of the Act and under our prescription authority contained in Section 205 of the Act.[411] Consistent with our approach in 1990, we will not entertain complaints filed pursuant to Section 208 of the Act, claiming that overall company earnings that are consistent with this prescription are excessive. Complaints that particular rates are unjust and unreasonable in light of the relevant costs and profits, or that they are discriminatory, may continue to be filed.[412]

225. Some commenters have raised substantive and procedural issues regarding our authority to end sharing or change the rate of return levels that trigger sharing obligations in the backstop. Ad Hoc contends that the elimination of sharing would be unlawful, because it would ignore the requirement of Section 201 of the Communications Act that rates be just and reasonable and cannot be reconciled with the Commission's earlier reasoning on the need for earnings sharing.[413] We find no basis for this argument. Section 201(b) of the Communications Act does require just and reasonable rates, but neither that section nor other section of the Act require any specific method be used to achieve

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407 MCI Comments at 32.

408 LEC Price Cap Order, 5 FCC Rcd at 6823-24.

409 Id.

410 Cf. AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988).

411 See LEC Price Cap Order, 5 FCC Rcd at 6836.

412 See id.; see also AT&T Price Cap Order at 3100, 3135-36.

413 Ad Hoc Reply at 19-21.

that goal. While we have the authority and discretion to set rates of return as a method of assuring reasonable rates,[414] rate-of-return regulation is not a statutory requirement. Various methods may be used to set rates, provided the total effect is just and reasonable.[415] This Commission has, for example, adopted a pure price cap plan for AT&T as well as incentive regulation plans for LECs that do not contain rate-of-return backstop mechanisms.[416] We also find no inconsistency with the goals of price caps or our earlier statements. We have always recognized the drawbacks of the backstop, particularly its dampening effect on productivity incentives; we included the backstop as a "cautious and careful approach" to price caps that we stated we would consider ending in this performance review.[417] Ending the backstop only for LECs willing to elect a substantially higher X-Factor represents a continued careful step toward improving the LEC price cap plan, strengthening the productivity incentives of the plan while assuring reasonable rates during the interim period it is expected to be in place.

226. Some LECs, though supporting ending the backstop, nonetheless contend that the Commission may not adjust the rate of return levels in the backstop in this proceeding. NYNEX contends that the language of the Notice seeking comment on "[w]hether the sharing and low-end adjustment mechanisms should be realigned with capital costs, and if so, how this should be done" does not provide adequate notice needed to resolve the specific issues involved in effecting a realignment.[418] To the contrary, however, the question of "how" a task should be done is understood in normal usage to include consideration of the specific details necessary to complete the task, not just the way it would be started. The general discussion of the backstop issues also made clear to the reader of the Notice that the rate of return levels in the backstop were subject to revision in this

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[414] Nader v. FCC, 520 F.2d 182 (D.C. Cir 1975).

[415] Federal Power Commission v. Hope Natural Gas, 320 U.S. 591 (1944); Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Farmers Union Central Exchange v. FERC, 734 F.2d 1486 (D.C. Cir.), cert denied, 469 U.S. 1034 (1984).

[416] Sections 61.39 and 61.50 of the Commission's Rules, 47 C.F.R. §§ 61.39, 61.50; and Section 61.41 et seq. of the Commission's Rules, 47 C.F.R. § 61.41 et seq.

[417] LEC Price Cap Order, 5 FCC Rcd at 6801, 6805.

[418] NYNEX Reply at 46-47.

proceeding.[419] As the other parties who discussed this issue demonstrated through their comments, the Notice gave fair and adequate notice that the Commission would be considering all issues associated with possible changes in the rate of return levels in the backstop.

227. SWB contends that any change to the sharing mechanism or productivity factor based on the relative earnings and effective rates of return of the price cap LECs would amount to a represcription and that any represcription would require that parties be notified to submit the types of evidence listed in Part 65 of the Commission's Rules.[420] This argument is also without merit. It is true that the backstop was adopted as rules pursuant to Sections 201 through 203 of the Communications Act and as a prescription pursuant to Sections 205(a) and 4(i), but it was not made subject to the rate of return prescription process in the Part 65 Rules. Section 65.1 of the Rules expressly excludes price cap LECs from the Part 65 Rules, with the exception of reporting requirements[421] and refund obligations for periods before a LEC was subject to price caps.[422] Section 65.701(d) ends the Part 65 rate of return prescription and refund liability for price cap LECs on December 31, 1990.[423] We also clearly indicated in 1990 when LEC price caps was adopted and in the Notice that we would consider all relevant evidence in deciding whether to revise all aspects of the plan, including the backstop.[424] Interested parties and the public should thus have

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[419] See Notice, 9 FCC Rcd at 1697 ("If the sharing and low-end adjustment mechanisms are retained, we also must consider whether to revise the rate of return thresholds triggering their application.")

[420] SWB Reply at 24.

[421] Section 65.600(c) of the Commission's Rules, 47 C.F.R. § 65.600(c).

[422] Section 65.703(g) of the Commission's Rules, 47 C.F.R. § 65.703(g); see also Amendment of Part 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, CC Docket No 92-133, 7 FCC Rcd 4688 (1992).

[423] Section 65.701(d) of the Commission's Rules, 47 C.F.R. § 65.701(d).

[424] LEC Price Cap Order, 5 FCC Rcd at 6835:

> We have not established, and do not intend to establish at this time, any specific standards or remedies, or even any specific instructions [for the performance

long been aware that we would consider revising the backstop rules and prescription in this proceeding, based upon any relevant evidence. They were also given express notice of this in the Notice that initiated this docket and full opportunity to submit evidence, analysis, and comment. We conclude that SWB and other commenters raise no valid substantive or procedural reasons why we should not adopt the interim changes in the LEC price cap backstop mechanisms discussed in this Report and Order.

228. Our decision to set the rate of return thresholds in the backstop to provide incentives for LECs to select appropriate X-Factors represents a modification of our original proposal to lower these thresholds. We find, however, that it is necessary to the proper operation of the LEC price cap plan pending the completion of the further rulemaking.

229. In the Notice, we observed that interest rates had fallen substantially since the LEC price cap plan was adopted and the rate of return thresholds in the backstop were set. We believed that this decline in the interest rate component of the cost of capital was strong evidence that capital costs as a whole had fallen.

230. Several parties in the original comment cycle, in May and June 1994 similarly supported lowering the thresholds, contending that as interest rates fell from 1991 through 1993, LEC capital costs declined sharply. AT&T estimated LEC capital costs under price caps averaged 9.93 percent;[425] MCI claimed that a contemporary cost of capital was 9.54 percent.[426] LECs objected to these proposals and calculations, arguing that LEC

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> review]. We intend to use all available data and information in our performance reviews . . .
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> The results of the performance review will enable us to revisit, with experience some of the issues raised here, but, contrary to the assertions of some commenters, its effectiveness does not depend on the existence of specific standards and remedies. The performance review should provide sufficient information to allow the Commission to reevaluate the need for low-end adjustment and sharing mechanisms, and to adjust the sharing mechanisms and productivity factor if necessary. At that time we will evaluate all aspects of the price cap plan and of LEC performance.

See also Notice, 9 FCC Rcd at 1704 (Baseline Issue 11).

[425] AT&T Comments and Appendix D.

[426] MCI Comments and Appendix A.

capital costs are higher now than in 1990 as a result of the higher risks of competition they face, that their earnings are reasonable in relation to those of other companies (including IXCs such as AT&T and MCI) and the earnings thresholds set by the Commission, and that the AT&T and MCI cost of capital calculations are flawed.[427]

231. In the Notice we cited decreases in interest rates as a possible reason for a one-time adjustment in price cap rates. After the Notice was adopted, however, interest rates increased significantly. For example, in January, 1991, the average yield on 10-year treasury notes was 8.09 percent. In January, 1994, 10-year treasury notes had an average yield of 5.75 percent.[428] On January 31, 1995, however, the yield on 10-year treasury notes was 7.62 percent.[429] Although carriers received an unanticipated benefit during part of the four year period under review, we have no basis upon which to conclude that interest rates will be similarly low in the future. There no longer appears to be strong cause for reducing access rates in the 1995-96 rate period to account for changes in interest rates.

232. We have recently reached a similar conclusion with respect to represcription of the allowed rate of return for LECs subject to rate of return regulation.[430] In the ROR Reform Order we replaced our rule requiring represcription of the rate of return every two years with a semi-automatic "trigger mechanism" for determining when the cost of capital may have changed sufficiently to consider beginning a rate of return proceeding. This mechanism operates by comparing current yields on ten-year treasury securities with yields at the time of the last represcription. If current yields remain 150 basis points (1.5 percent) above or below the reference level for six consecutive months, the Common Carrier Bureau will issue a notice inviting comment on whether the Commission should begin a represcription proceeding. At present, represcription of the rate of return is not indicated.[431]

233. Under the current price cap rules, the price cap sharing zones are not affected by represcription of the

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[427] See, e.g., USTA Reply at 9-15 and Attachment 2.

[428] We obtained these bond interest rates from a computer on-line service provided by the Federal Reserve Bank of St. Louis.

[429] New York Times, Jan. 31, 1995, at D19, col. 1.

[430] See ROR Reform Order.

[431] Id.

authorized rate of return for LECs subject to rate-of-return regulation. Questions have been raised in this proceeding concerning the extent to which changes in the LECs' cost of capital are reflected in the GDP-PI. In the Further Notice, we will seek comment on how to incorporate changes in the cost of capital into the price cap formula.

234. Finally, we decline to adopt any special rules governing fourth quarter accounting adjustments, as MCI recommends. We have been monitoring fourth quarter accounting adjustments for several years now, and we have found no evidence that those adjustments are improper, or intended only to manipulate sharing obligations. Furthermore, we disagree that establishing a deadline of September 15 for fourth quarter accounting adjustments would make those adjustments more or less reasonable, or more or less likely to comply with our rules.

## E. One-time Rate Changes

### 1. Background

235. In the Notice the Commission sought comment on whether it should require a one-time downward adjustment to the LEC price cap indexes. We pointed to increased LEC earnings and lower interest rates as possible justifications for such a rate reduction. At the same time, we stated that it was crucial to avoid undermining the profitability incentive that price caps seeks to create. We asked parties to explain how their proposals would preserve or improve price caps incentives and assure just and reasonable rates.[432]

### 2. Comments

#### a. Adjustment Based on Changes in Capital Costs or Interest rates

236. MCI, AT&T, GSA, and CCTA support a one-time reduction in the LECs' price cap indexes based on a decline in the cost of capital.[433] MCI also advocates recalibrating the sharing mechanism and adjusting the price cap index to reflect the lower cost of capital.[434] MCI suggests that, at each subsequent price cap review, the Commission should establish the current cost of

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[432] Notice, 9 FCC Rcd at 1695-96.

[433] MCI Comments at 26-27; AT&T Comments at 30-33; CCTA Reply at 10-17; GSA Reply at 5-14.

[434] MCI Comments at 27.

capital and reset the sharing mid-point and boundaries accordingly.[435] On the other hand, ICA contends that either the price cap index or the sharing mechanism should be indexed for changes in interest rates.[436]

237. According to AT&T and GSA, the LECs' cost of capital has decreased greatly since we adopted LEC price cap regulation, and that only half this decrease was reflected in the GNP-PI.[437] AT&T recommends requiring the LECs to reduce their current PCIs by a total of $322 million.[438] AT&T submitted a cost of capital analysis in which it concludes that, over the period 1991-1993, the LECs' cost of capital averaged 9.93 percent.[439] MCI submitted the testimony of Matthew I. Kahal, purporting to show that, since 1990, the overall cost of capital for LECs has fallen from 11.25 percent to 9.54 percent.[440] GSA suggests that the Commission should commence a rate of return represcription proceeding, and should reduce the LECs' PCIs to reflect that revised rate of return.[441] CCTA notes that the California Public Utilities Commission recently reset Pacific Bell's intrastate rate of return at 10.00 percent, based on reductions in the cost of capital since 1989. Because of this, CCTA argues that we should prescribe a 10 percent interstate rate of return, and reduce the LECs' PCIs accordingly.[442]

238. USTA and the LECs, as well as Sprint and CSE, oppose

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[435] MCI Comments at 23-27. MCI favors adjusting the price cap formula in future performance reviews, rather than adjusting the PCI, to reflect changes in the cost of capital. MCI argues that most LEC debt is long-term, fixed-rate debt, and that short-term interest rates have little effect on total debt costs. Therefore, according to MCI, it is not necessary to adjust the PCI annually to reflect interest rate changes. MCI Comments at 27 n.47.

[436] ICA Comments at 13.

[437] AT&T Comments at 30-33; GSA Reply at 8.

[438] AT&T Comments at 30-33.

[439] AT&T Comments, Appendix D.

[440] MCI Comments, Appendix A, Statement of Matthew I. Kahal Concerning: Cost of Capital (dated May 1994).

[441] GSA Reply at 5-7, 10-14.

[442] CCTA Reply at 10-17. CCTA also maintains that the sharing and lower end adjustments should be based on a 10.00 percent rate of return. Id. at 10-11.

any one-time adjustment to price cap rates to reflect changes in interest rates or the cost of capital.[443] These commenters contend that a one-time downward adjustment would constitute a recapture of past productivity gains, thereby diminishing the LECs' incentives to innovate and invest.[444] BellSouth and CSE argue that adjusting the price cap index to reflect lower interest costs could undermine the LECs' incentives to make prudent decisions regarding the timing of investments and the term structure of debt.[445] Some of these commenters assert that any such adjustments would be inappropriate because price cap regulation is intended to separate prices from rate of return.[446] They also argue that interest rate changes are already reflected in the GNP-PI.[447] Ameritech maintains that, like tax rate changes, interest rate changes are a normal risk of doing business and, therefore, should be considered endogenous.[448] Similarly, BellSouth argues that, regardless of whether LEC capital cost changes are reflected completely in the GNP-PI, adjusting the PCI for changes in the cost of capital without making such adjustments for changes in the cost of labor might create a disincentive against using the optimum mix of labor and capital.[449] Ameritech interprets AT&T's argument that LEC capital cost changes were not completely reflected in the GNP-PI as an attempt to replace GNP-PI retroactively with an industry-specific inflation measure. Ameritech asserts that the

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[443] USTA Comments at 79; NYNEX Comments at 36; Lincoln Comments at 10; RTC Comments at 20 n.36; Bell Atlantic Comments at 13; GTE Comments at 74; Pac Bell Comments at 34; US West Comments at 17; SWB Comments at 41; CSE Comments at 4; SNET Comments at 13-14; Ameritech Comments at 12; Lincoln Reply at 4; BellSouth Reply at 20-21; Sprint Reply at 15 (the cost of capital has not shown any persistent change and that no adjustment for changes in capital costs is appropriate).

[444] USTA Comments at 80; SWB Comments at 38-39; Ameritech Comments at 12-13; US West Comments at 36-37.

[445] BellSouth Reply at 17-18; CSE Comments at 4-5.

[446] BellSouth Comments at 38; US West Comments at 17; RTC Comments at 20 n.36; SWB Reply at 30.

[447] Ameritech Comments at 13; BellSouth Comments at 38; Bell Atlantic Comments at 13; Pac Bell Comments at 34; US West Comments at 17; Lincoln Comments at 10.

[448] Ameritech Comments at 13.

[449] BellSouth Reply at 14-17.

Commission has rejected similar proposals in the past.[450]

239. USTA and some LECs assert that MCI and AT&T's cost-of-capital calculations fail to justify their recommendations for a one-time rate adjustment.[451] According to USTA, MCI errs in concluding that competition has had no impact on the LECs' cost of equity and overall cost of capital.[452] USTA claims that the following aspects of MCI's expert testimony produce a downwardly-biased result: use of the RBHCs as a risk proxy for the BOCs;[453] use of the RBHCs' (as opposed to the BOCs') capital structure;[454] failure to account for equity flotation costs; and use of the "annual form" of the discounted cash flow (DCF) model when the RBHCs and most other firms issue quarterly dividends.[455] USTA argues that AT&T's analysis of historical evidence on the LECs' cost of capital from 1991 to 1993 is irrelevant to an assessment of the LECs' current cost of capital. USTA also contends that AT&T's historical estimates are flawed by generally the same errors that USTA perceives in MCI's analysis.[456]

240. In a December 21, 1994, ex parte, statement, MCI submitted data on LEC Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA). According to MCI, the RBOCs' EBITDA margin is 46 percent, compared with an IXC average of 19.0 percent, and a national average of 13.9 percent.[457] According to SWB, MCI has shown only that the LEC industry is more capital intensive than other industries, not that LEC earnings have been unreasonable.[458]

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[450] Ameritech Reply at 6-7, citing AT&T Price Cap Order, 4 FCC Rcd at 2794; LEC Price Cap Order, 5 FCC Rcd at 6793.

[451] USTA Reply at 12; GTE Reply at 10-14; BellSouth Reply at 18-20; NYNEX Reply at 40-43; Ameritech Reply at 6.

[452] USTA Reply at 13.

[453] USTA Reply at 14; accord GTE Reply at 11-12.

[454] USTA Reply at 14.

[455] USTA Reply at 14; accord GTE Reply at 11-12.

[456] USTA Reply at 13-15.

[457] Letter from Donald F. Evans, MCI, to Acting Secretary, December 21, 1994.

[458] SWB January 18 Comments at 19 and Attachment 1. SWB also repeats its earlier argument that return on equity studies should not be based on aggregated Bell Regional Holding Company data. SWB January 18 Comments at 20-21.

241. US West and SWB assert that a one-time reduction based on relative earnings and effective rates of return of the price cap LECs would require a rate prescription proceeding under Section 205 of the Communications Act.[459] USTA and SWB argue that the Notice did not provide notice of a represcription proceeding and, therefore, the Commission is legally precluded from prescribing a new LEC rate of return in this proceeding.[460]

**b. Adjustment Based on Reassessment of the Productivity Factor**

242. As discussed in Section IV.B., above, MCI contends that the 1984 data point in the Frentrup-Uretsky Study was in error, and that the X-Factor should have been 5.9 percent rather than 3.3 percent.[461] Based on this contention, MCI advocates reducing the PCI by the difference between 5.9 percent and 3.3. percent for each of three annual price cap filings, or at least 7.5 percent.[462] ICA recommends a one-time three percent PCI reduction. ICA bases this figure on the difference between the current 2.8 percent productivity factor and the midpoint of various LEC-sponsored TFP calculations since 1984 and the calculations submitted by major ratepayers, which, according to ICA, is 5.8 percent.[463] ICA suggests that the one-time adjustment could be applied either pro rata to each of the LEC's services or specifically to common line and residual transport interconnection rate elements.[464] Sprint would target these rate reductions first to high and medium zone density transport rates, and then if the LEC chooses, to common line rates.[465]

243. As discussed in more detail above, USTA and some LECs oppose removing the 1984 data point from the Frentrup-Uretsky

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[459] US West Reply at 21; SWB Reply at 24.

[460] USTA Reply at 12; SWB Reply at 24; see also NYNEX Reply at 39 (the Commission cannot change rate-of-return prescriptions retrospectively).

[461] Section IV.B.2.d, supra.

[462] MCI Comments at 25-27.

[463] ICA Comments at 12; ICA Reply at 2.

[464] ICA Comments at 12-13; ICA Reply at 1-3.

[465] Sprint Reply at 4-8.

Study.[466] USTA opposes MCI's recommendation for a 7.5 percent PCI reduction, because it disagrees with MCI regarding the 1984 data point, and because it contends a rate reduction would constitute productivity recapture.[467] US West contends that MCI's proposed one-time productivity adjustment would constitute retroactive ratemaking.[468]

**c. Adjustment as a Quid Pro Quo for Other Changes in the Price Cap Plan**

244. Sprint suggests that a permanent 2 percent price cap revenue reduction could be justified as a quid pro quo for eliminating the sharing mechanism from the LEC price cap plan.[469] Similarly, USTA included a 1 percent "up front" rate reduction as part of its ex parte proposal for a new price cap option in which a moving average productivity offset would replace the sharing and low-end adjustment mechanisms.[470]

**3. Analysis**

245. In section IV.B., above, we find that the productivity factor in our current price cap formula was set lower than we intended due to the inclusion of 1984-85 data in the Frentrup-Uretsky short-term productivity study. We now find that a one-time reduction in price cap rates is necessary to ensure that this error does not, in the future, lead to unreasonably high rates and that it does not continue the current balance between ratepayer and shareholder interests, which is less favorable to consumers than we intended. We reject all other proposals for one-time reductions based on changes in interest rates, on changes in the overall cost of capital, or based solely on the observation that LECs have experienced high earnings under price caps.

246. A one-time reduction in LEC PCIs is required to correct, on a prospective basis, the effects of our underestimation of LEC productivity. Correct specification of the productivity factor was a critical element in the balance we struck between ratepayer and LEC shareholder interests when we

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[466] USTA Reply at 58-59; US West Reply at 25; Pac Bell Reply at 22-23; Bell Atlantic Reply at 14-16; GTE Reply at 26; Lincoln Reply at 6-7; SWB Reply at 41, cited in Section IV.B.2.d, supra.

[467] USTA Reply at 59.

[468] US West Reply at 25.

[469] Sprint Reply at i-ii, 4-5.

[470] January 18 Letter at 3-4.

instituted price cap regulation.[471] LECs were supposed to become more efficient if they wished to exceed the earnings they would have been permitted under rate of return regulation. Ratepayers were to benefit from rates reduced to the level that would provide this challenge. If, as we now conclude, the productivity factor we selected was lower than the actual difference between LEC productivity and that of the economy as a whole, then the price cap formula was less favorable to ratepayers, and more favorable to shareholders, than we intended. Some portion of the LECs' increased earnings were obtained without any productivity improvements, and rates were not as low as we intended.

247. The sharing mechanism, to this point, has operated as intended, to ameliorate, but not eliminate, the effects of our selection of a low productivity offset. By this time, however, LEC PCIs are at a level that will allow future rates to be significantly higher than they would have been had we made a more accurate estimate of LEC productivity. Specifically, and as explained below, PCIs are now as much as 2.8 percent higher than they would have been had we excluded the 1984 data point from the Frentrup-Uretsky study. We find that this difference between the rate levels we intended to produce and the rate levels that actually exist will, if perpetuated, unreasonably shift the balance of ratepayer and shareholder interests in favor of LEC shareholders. We therefore direct LECs to make a one-time reduction in their PCIs. This reduction shall be made in the 1995 annual access tariff filing so that it will be reflected in interstate access rates that take effect August 1, 1995.[472]

248. Specifically, for each year that a LEC elected an X-Factor of 3.3 percentage points, we conclude that the X-Factor for that LEC was 0.7 percent too low. Therefore, we require LECs to multiply their current PCIs for the common line basket, traffic sensitive basket, and trunking basket by a factor equal to the following equation:

$$1 - (0.007n)$$

where n is the number of years the LEC elected to use an X-Factor of 3.3 percent. We find this reinitialization is necessary for the trunking basket as well, even though this basket has existed only for about one year. Prior to the transport restructure, the services in the trunking basket were either in the special access

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[471] LEC Price Cap Order, 5 FCC Rcd at 6796.

[472] The Common Carrier Bureau recently rescheduled the effective date for the price cap LECs' 1995 annual access filings from July 1, 1995 to August 1, 1995. 1995 Annual Access Tariffs, United States Telephone Association, Application for Waiver, DA 95-494 (Com. Car. Bur., released Mar. 16, 1995).

basket or the traffic sensitive basket. The rates for those services were higher than we should have expected them to be both before and after the transport restructure. Therefore, it is necessary for LECs to make the same adjustment to the trunking basket as they do to their common line and traffic sensitive baskets. Price cap LECs are hereby required to make this adjustment in their 1995 annual access filings.

249. In the case of the interexchange basket, we conclude that no adjustment is warranted. We originally set the interexchange basket X-Factor at 3.0 percent, equal to AT&T's X-Factor. This was because LECs provide the services in that basket in competition with AT&T's interexchange services.[473] Because we did not rely on the Frentrup-Uretsky study in setting the interexchange X-Factor, no adjustment to that basket is warranted now.

250. We realize that this formula only approximates what the carriers' PCIs would be if we had established an X-Factor of 4.0 percent in 1990. We believe that this will represent a very close approximation in most if not all cases. Nevertheless, there may be some LECs which can make a reasonable showing that the simple adjustment described above significantly overstates the effect of the 3.3 percent rather than the 4.0 percent X-Factor in their cases. We do not wish to foreclose any carrier which can make such a showing from doing so.

251. Therefore, any LEC maintaining that the simple PCI adjustment described above overstates the one-time adjustment appropriate for it may file a waiver petition concurrently with its annual access filings showing the basis for its assertion. Specifically, any LEC seeking a waiver must determine what its current PCIs would be if it had used an X-Factor of 4.0 percent rather than 3.3 percent each time it used 3.3 percent since 1990. We will consider the waiver request of any LEC showing that the resulting adjustment factor differs from the simple formula adjustment described above by more than one tenth of one percentage point. LECs are required to use actual growth figures to develop the PCI for the common line basket, and to make the same exogenous cost adjustments that they made in their original PCI calculations. LECs will also be required to show the effects of the transport restructure, and any midyear PCI adjustments.

252. We disagree with USTA and others who characterize a one-time adjustment to the rates of price cap LECs as a recapture of productivity gains. First, there is no element of a refund in this adjustment. We are calculating the adjustment solely on the basis of our reassessment of where the LECs' PCIs would now be if we had not underestimated the productivity factor, and we are

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[473] LEC Price Cap Order, 5 FCC Rcd at 6811.

applying it prospectively only. The adjustment will not return to ratepayers any portion of the amounts by which their past rates would have been lower had we been using the higher productivity offset all along. Second, the increment of past LEC earnings that was attributable to our understatement of the productivity offset did not represent true productivity gains at all. The one-time adjustment merely ensures that, in the future, higher earnings must be attained through actual improvements in productivity and will not continue to accrue as a result of administrative error.

253. We reject US West's contention that a one-time productivity adjustment constitutes retroactive ratemaking. The rule against retroactive ratemaking bars the Commission from allowing a carrier to raise rates to recoup past underrecovery, or from forcing a carrier to reduce rates to make up for past overrecovery.[474] Indeed, we do not hold here that price cap LECs "overrecovered" from ratepayers during the past four years of price caps. However, the rule against retroactive ratemaking does not preclude the Commission from looking back, as we have done here, at the results of past applications of our rate formulas in order to determine whether those formulas will continue to produce reasonable rates in the future. As explained above, the adjustment we are requiring will not return to ratepayers any amounts charged to them in previous years. We are allowing LECs to keep all of the earnings they were allowed under the original price cap formula. We are not, therefore, engaging in retroactive ratemaking.

254. We emphasize that we have not found that LEC rates that were set in the past in accordance with the price cap rate formula were unreasonably high. Rather, they were not as low as we intended them to be because of our less-than-accurate estimate of LEC productivity. The price cap rate formula, including the 3.3 percent productivity offset, was adopted as a rule by this Commission, and carriers were entitled to rely upon it. Furthermore, the effects of our underestimation of productivity were moderated by a sharing mechanism that we prescribed pursuant to Section 205 of the Communications Act specifically to protect against such an eventuality as this.[475] We determined in the LEC Price Cap Order that the 100 percent sharing requirement, in conjunction with the price cap ceiling, would ensure that LEC rates would remain within a zone of reasonableness.[476] There is no evidence in this record to suggest that rates under price caps

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[474] See, e.g., Nader v. FCC, 520 F.2d 182, 202 (D.C. Cir. 1975).

[475] LEC Price Cap Order, 5 FCC Rcd at 6802.

[476] LEC Price Cap Order, 5 FCC Rcd at 6836.

have exceeded the upper bound of this zone.

255. For the same reasons that we have decided not to recalibrate the sharing and low-end adjustment mechanisms because of alleged changes in the LECs' cost of capital at this time, we also decline to make a one-time adjustment to 1995-96 access rates based on a new determination of the LECs' overall cost of capital.[477]

256. Finally, we find that requiring LECs to calculate a separate rate adjustment for the PCIs of their common line, traffic sensitive, and trunking baskets would best approximate the PCIs that would be in effect now if we had excluded the 1984 data point from the Frentrup-Uretsky Study. Therefore, we do not adopt ICA's suggestion of using this one-time adjustment to reduce the transport residual interconnection charge or common line rates, or Sprint's suggestion of targeting this reduction to high and medium zone density transport rates.[478] Nevertheless, we agree with ICA that it might be in the public interest to reduce the residual interconnection charge so that it is not as high relative to other transport charges. Accordingly, in the further notice, we will consider exploring means of adapting the price cap plan to lower the transport residual interconnection charge.

## V. OTHER BASELINE ISSUES

### A. Common Line Formula

#### 1. Background

257. In the LEC Price Cap Order, we adopted a formula to adjust the price cap index for the common line basket that is slightly different from the formula that we adopted to adjust the PCIs for the other three baskets.[479] This difference stems from the fact that, although the actual costs of common line are non-traffic sensitive, a portion of the cost is recovered through rates that are traffic sensitive.[480] Specifically, a portion of the common line costs is recovered by carrier common line charges that are assessed on interexchange carriers and other access

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[477] See Section IV.C.3. of this Order, supra.

[478] ICA Comments at 12-13; ICA Reply at 1-3; Sprint Reply at 4-8.

[479] LEC Price Cap Order, 5 FCC Rcd at 6787.

[480] Id. at 6793-95.

customers using switched, interstate access services based on minutes of use. The remaining portions of common line costs are recovered through flat rates charged to end-users.[481]

258. To provide incentives for greater productivity in the provision of common line service, the Commission devised a special formula for capping carrier common line rates, known as the "Balanced 50-50 formula." Reflecting the Commission's belief that both the LECs and the interexchange carriers could influence growth in common line usage, the Balanced 50-50 formula splits both the gains and losses in usage per line between LECs and their customers in order to provide incentives for both to stimulate demand.[482]

259. In the Notice, we requested comment on whether the Commission should reconsider its use of the Balanced 50-50 formula to cap common line charges. In the Notice, we noted that the LEC Price Cap Order had acknowledged the uncertainty of identifying the sources of carrier common line demand growth and predicting future sources of growth and their magnitude, and, consequently, had stated that, as we gained experience with the price cap plan, we might develop sufficient evidence to calculate a different split.[483] In the Notice, we solicited comment on what method the Commission should use to cap common line charges and whether adjustments to other parts of the plan would be warranted if the Commission adopted a per-line formula to cap common line charges. In requesting comment on this issue, we noted that in the LEC Price Cap Order the Commission stated that, because the Balanced 50-50 formula gives part of the benefit of demand growth to LECs, while the per-line formula does not, the Balanced 50-50 formula requires an X-factor that is about 0.5 percent higher than a per-line formula, in order to produce the same change in the PCI.[484]

**2. Comments**

260. USTA and some of the LECs assert that a common line formula adjustment to account for demand growth would not be necessary if the Commission adopts USTA's recommendation that the productivity factor be based on an analysis of long-term,

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[481] Id. at 6793-95.

[482] Id. at 6793-95.

[483] LEC Price Cap Order, 5 FCC Rcd at 6795 n.83.

[484] LEC Price Cap Order, 5 FCC Rcd at 6798.

industry-wide total factor productivity (TFP).[485] They claim that, because TFP already incorporates the effects on overall productivity of all productive inputs, a common line formula that includes an adjustment for demand growth (such as the Balanced 50-50 formula) effectively "double-counts" the productivity gains reflected in the measure of TFP.[486] USTA maintains that a per-line formula would double-count 100 percent of LEC output growth reflected in a TFP analysis, while a 50-50 formula would double count half of the LEC output growth.[487]

261. USTA asserts that, if the Commission decides not to adopt TFP as the basis for determining LEC productivity, then the Commission should retain the Balanced 50-50 formula.[488] USTA contends that the LECs stimulate interexchange usage through advertising, lower access rates, new technologies, equal access, and "call waiting and voice mail which facilitate call completion."[489] NYNEX claims that the Balanced 50-50 formula has produced significant downward pressure on carrier common line rates and should be retained.[490] USTA and GTE also argue that the fact that demand growth may have slowed under price cap regulation cannot necessarily be attributed to the LECs or to the operation of the common line formula.[491] They say that other factors -- including the downturn in the economy, increases in long-distance rates, and the growth of competitive alternatives -- are likely to have been responsible for the demand growth decrease.[492]

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[485] USTA Comments at 84-85; Lincoln Comments at 14; GTE Comments at 75-77; Bell Atlantic Comments at 18; BellSouth Comments at 52-54.

[486] BellSouth Comments at 52; USTA Comments at 84-85; Lincoln Comments at 14; GTE Comments at 75-77; Bell Atlantic Comments at 18.

[487] USTA Comments at 84-85.

[488] USTA Comments at 85 n.217.

[489] USTA Comments at 61-63; see also SWB Reply at 52 (LEC access charge reductions over the 1991-93 time period were an important factor in stimulating carrier common line demand).

[490] NYNEX Comments at 48. NYNEX also states that its average effective premium carrier common line rate has decreased approximately 11 percent annually. Id.

[491] USTA Comments at 61-63; GTE Reply at 33-35.

[492] Id.

262. AT&T, MCI, Sprint, and WilTel contend that the Balanced 50-50 formula should be eliminated because it understates the interexchange carriers' contribution to common line growth and overstates the LECs' contribution.[493] They state that the rate of growth in common line usage under the current formula has declined substantially from its levels prior to the adoption of incentive regulation and, therefore, the Balanced 50-50 formula has failed to achieve its objective of encouraging growth in common line usage.[494] MCI, Sprint, AT&T, and ICA recommend that the Commission adopt a per-line formula for capping common line rates.[495] MCI, Sprint, and ICA claim that a per-line formula will accurately reflect the role that the interexchange carriers play in stimulating demand growth.[496] AT&T asserts that a per-line formula for capping common line rates creates appropriate incentives for LECs to increase their productivity and reduce their costs because it automatically reduces per-minute common line charges as demand increases.[497] AT&T and Sprint maintain that, if the Commission adopts a per-line formula, the X-factor would have to be reduced by 0.8 percent.[498] MCI and SWB contend that the X-Factor would have to be reduced by 0.5 percent and 1.1 percent, respectively, if a per-line formula were adopted.[499]

263. SWB asserts that the Commission's rules mandating the recovery of end-user costs through carrier common line charges to interexchange carriers place the LECs at a competitive disadvantage in access markets and perpetuate uneconomic pricing

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[493] MCI Comments at 35; WilTel Comments at 26; AT&T Comments at 27-28; Sprint Comments at 15-17.

[494] Id.

[495] MCI Comments at 38-39; Sprint Comments at 15-17; AT&T Comments at 27-28; see also id. (the Commission should adopt a per-line formula for capping common line charges but only as an alternative to an end-user charge that fully reflects costs for non-traffic sensitive cost recovery); ICA Comments at 15.

[496] MCI Comments at 38-39; Sprint Comments at 15-17; ICA Comments at 15; see also WilTel Comments at 26.

[497] AT&T Comments at 27-28.

[498] AT&T Comments at 26 and Appendix B; Sprint Comments at 15; Sprint Reply at 14.

[499] MCI Comments at 23; SWB Reply at 53; see also BellSouth Reply at 28 (the productivity factor would have to be adjusted downward if a per-line formula were adopted).

levels.[500] SWB recommends that the LECs should be accorded the flexibility to increase the End User Common Line (EUCL) charges and reduce carrier common line rates.[501] Alternatively, SWB urges the Commission to develop a transitional plan permitting LECs the flexibility, over time, to increase EUCL charges.[502]

**3. Analysis**

264. There are two ways that LECs can improve their efficiency in providing common line service. They can seek to reduce their cost of service by lowering the cost per loop and they can attempt to increase the usage of the line, as measured by minutes of use. Since common line costs are non-traffic sensitive, increasing the usage per line reduces the amount of the fixed cost that must be recovered from each unit of traffic (minute of use). The issue is whether the LECs, the IXCs or both are responsible for increasing common line usage. If the LECs influence the usage levels, then the price cap rules should create an incentive for the LECs to promote greater usage of common lines. This could be accomplished by not adjusting the index for the CL basket each year to reflect increased or decreased usage. This approach (known as the "per-minute approach" because the per-minute charge is constant) would allow the LECs to keep the surplus or bear the burden of a revenue deficit.

265. Alternatively, if the IXCs are largely responsible for fostering growth in common line usage, the Commission's price cap rules should create an incentive for the IXCs to do so by passing through the reduction in average per-minute costs to the IXCs in the form of lower CCL rates. In that event, the price cap formula should cause the LECs' CCL rates to move downward to

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[500] SWB Comments at 47-48.

[501] SWB Comments at 47-48.

[502] SWB Comments at 47-48; SWB Reply at 49-51; see also Pac Bell Comments at 51-52 (the Commission should reduce or eliminate the carrier common line charge, and cap all end user common line charges at $6.00; competitive pressures from PCS, cable TV, and cellular loops will exert downward pressure on EUCL charges); NYNEX Comments at 49-50 (with the growth of competition, "the Commission should permit price reductions below the maximum level produced by the [carrier common line] formula by class of service and geographic area, and allow use of the revenues from these price reductions to either establish a flat-rated usage rate, or to increase other rates . . ."); id. (the rules should be changed "to provide for the use of historical, rather than forecasted, revenues in determining end user charges"); US West Reply at 32 (supporting NYNEX's recommendations).

reflect increases in common line usage. The per-line approach would force CCL rates down faster than either the per-minute or balanced 50-50 approach.

266. The current CL Formula is a compromise that attempts to create incentives for LECs to promote greater common line usage. It sets the PCI for the CL basket to reflect expected LEC performance in lowering loop costs and to share the benefits of the productivity gains associated with increased common line usage between LECs and their customers. The LECs clearly can influence their average cost per loop to some degree by lowering costs and, thus, should have an incentive to do so. However, it is not as clear to what degree LECs can influence subscriber usage. In the LEC Price Cap Order, we concluded that there was no determinative evidence in the record that established where future demand increases would originate -- from LEC or IXC efforts.[503] Thus, we were reluctant to adopt a plan that would discourage potential sources of increased productivity. Although we were hopeful that this review would show that both LEC and IXC efforts substantially affect demand growth, it appears that the record does not bear this out. The record does not support a finding that LECs have a significant effect on common line usage.

267. Although the LECs assert that their marketing efforts and high service quality contribute importantly to the growth in common line traffic, they provide little concrete evidence that these efforts in fact have a significant effect on the volumes of interstate calling per line. As the other commenters point out, this usage appears to be almost totally a function of the price, quality, and marketing of IXC services as well as general economic trends.

268. It also appears that an individual LEC has little ability to increase its traffic per common line by reducing its individual CCL rates. CCL rates are paid by IXCs that charge nationwide-averaged rates for the long distance services that use common lines, based on nationwide-averaged CCL rates. The effect is that, even if a LEC chose to set below-cap rates, end-user customers located in the LEC's service territory would see little effect on the nationwide-averaged interstate long-distance rates they pay. Accordingly, those customers would have correspondingly little incentive to increase their usage per common line. The LEC, in turn, would see little effect on its individual traffic.

269. The foregoing conclusions suggest that it is not necessary to create price cap incentives for LECs to increase growth in common line usage, because they have little influence over such growth. Instead, our analysis indicates that price cap

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[503] LEC Price Cap Order, 5 FCC Rcd at 6795.

CCL rates should be adjusted to reflect trends in common line usage in order to give IXCs an incentive to increase that usage. Accordingly, we decline to adopt the per-minute formula, which would reduce IXC incentives because it would permit the LECs to maintain a higher CCL rate. All changes in usage per line would affect LEC profits, but would not affect the CCL rate because the CCL formula would no longer include a factor to reflect changes in common line usage.[504]

270. We tentatively conclude that the per-line formula properly recognizes that loop costs are not traffic sensitive.[505] The per-line formula accomplishes this by including a factor that incorporates usage per common line into the calculation of the CCL rate. As the costs per loop are spread over increasing usage per line, the CCL rate would be reduced.[506]

271. Although we tentatively conclude that the per-line formula is superior to the per-minute and 50-50 formulas for the long term, we find it advisable to retain the balanced 50-50 approach for the 1995 annual access tariff filing. As discussed above, the Commission intends to issue a further notice of proposed rulemaking to determine whether and how the Commission should calculate a productivity factor based on TFP. As noted above, USTA and some of the LECs assert that, if the Commission decides to adopt a productivity factor based on TFP, an adjustment to the common line formula to account for demand growth would not be necessary. In light of the lack of consensus in the record on this issue and our intention to initiate a further rulemaking addressing a TFP-based productivity factor, we

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[504] There might be indirect effects, however, through the re-calculation of the overall X-Factor to include the growth in minutes per line in the X-Factor itself.

[505] The per-line formula is also the only formula that is consistent with the separations process of allocating a fixed percentage of loop costs to the interstate jurisdiction.

[506] AT&T would be required to pass through to customers of its Basket 1 services (basic domestic and international MTS) any reduction in the CCL rate. Thus, its customers would benefit from the per-line formula through lower rates and AT&T would benefit from the expected stimulation of demand caused by lower toll rates for Basket 1 services. AT&T would not be required to pass through any CCL reduction in rates for non-Basket 1 services. Similarly, AT&T's non-dominant competitors would not be required to lower any of their rates to reflect a decrease in CCL charges.

do not change the Balanced 50-50 formula in this proceeding.[507] Instead, we anticipate revisiting this issue in the further rulemaking. At that time, the Commission will be in a better position to evaluate not only whether and how to adopt a TFP-based productivity factor, but also how the adoption of such a productivity factor would affect issues involving the use of common line formula adjustment.[508]

272. Furthermore, because we are adopting only an interim plan at this time, and because we may decide to eliminate the common line formula in the long-term plan, we conclude that revising the plan at this plan would create excessive rate churn and confusion. We find that the potential public benefits of a per-line formula during the interim period are not sufficient to justify that rate churn.

273. In the LEC Price Cap Order, we developed our balanced 50-50 approach in conjunction with the X-Factor. Specifically, we first developed a "per-line X-Factor" assuming a per-line common line formula. Second, we calibrated a "50-50 X-Factor" that would produce the same carrier common line charges with the 50-50 X-Factor as would have been produced with a per-line formula and a per-line X-Factor. This calibration for the 50-50 X-Factor was based in part on estimated average minute of use growth. We based our demand estimates on historical demand from 1984 to 1991, adjusted to remove the demand stimulation resulting from the Subscriber Line Charge and other exogenous cost adjustments. We think it likely that demand growth in the interim period will be approximately equal to the demand levels used to calibrate the 50-50 X-Factor. Therefore, we conclude that there will be little if any harm to the interests of either LECs or access customers from retaining the 50-50 formula during the interim period.

## B. Exogenous Cost Adjustments

### 1. Background

274. In the LEC Price Cap Order, the Commission determined that certain costs incurred by LECs caused by administrative,

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[507] In addition, converting from the current formula to the per-line formula for the 1995 filing would require LECs to recalculate all of their historic CL indexes in order to restate their current indexes.

[508] In any event, SWB's claim that the Commission should modify its rules governing the recovery of EUCL charges raises issues that are beyond the scope of this proceeding.

legislative or judicial requirements beyond the control of the carriers should result in an adjustment to the PCI to ensure that the price cap formula does not lead to unreasonably high or unreasonably low rates.[509] The Commission found that a decision not to recognize these costs in the PCI would either unjustly punish or unjustly reward the carrier by incorrectly treating them as changes in the carrier's level of efficiency.[510] The Commission called these costs "exogenous" or "Z Factor" costs. Exogenous costs specified in our rules include cost changes occasioned by: (1) completing the amortization of depreciation reserve deficiencies; (2) amendments to the Uniform System of Accounts; (3) changes in the Separations Manual; (4) reallocation of regulated investment to nonregulated activities; (5) changes in transitional and long term support; and (6) inside wire amortizations.[511] Exogenous treatment was explicitly rejected for other categories, including depreciation rate changes and equal access costs.[512] The rules also provide for exogenous treatment of other extraordinary cost changes to the extent we may permit or require.[513]

275. The Commission has also determined that not all changes beyond the carrier's control are to be given exogenous treatment. For example, the Commission held that, although tax law changes are outside the carrier's control, general tax law changes are reflected in the GNP-PI component of the price cap formula and, therefore, exogenous treatment of such changes would unfairly "double count" their impact. Accordingly, the Commission decided that only those tax changes that "uniquely or disproportionately" affect the LECs would be eligible for

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[509] LEC Price Cap Order, 5 FCC Rcd at 6807.

[510] Id.

[511] See Section 61.45(d) of the Commission's Rules, 47 C.F.R. § 61.45(d).

[512] LEC Price Cap Order, 5 FCC Rcd at 6806-09.

[513] For example, the Commission has allowed the LECs to treat as exogenous the reasonable costs they incurred specifically for the implementation and operation of the basic 800 data base service required by Commission orders. Provision of Access for 800 Service, CC Docket No. 86-10, 8 FCC Rcd 907, 911 (1993). The Commission reasoned that because it effectively required the implementation of this service and dictated the terms, conditions, and schedule for offering it, the reasonable costs specific to implementing basic 800 data base service are outside the carrier's control and, therefore, may be treated exogenously.

exogenous treatment.[514] Similarly, although changes in generally accepted accounting principles (GAAP) are outside the carrier's control, the Commission stated that "[i]f a GAAP change is universal enough to be reflected in the inflation measure, exogenous cost treatment would result in double counting within the context of the PCI."[515] Therefore, we decided to accord exogenous treatment to GAAP changes that have been adopted by the Financial Accounting Standards Board (FASB) and have become effective (and, thus, outside the carrier's control), and that have been shown not to involve double counting with the GNP-PI adjustment.[516]

276. To date, the most significant requests for higher exogenous costs concern changes in GAAP accounting for post-employment benefits, such as severance pay and other benefits for separated workers,[517] and employee post-retirement liabilities other than pensions, such as retirees' life insurance and medical and dental care benefits (commonly known as "other post-retirement employee benefits" or "OPEBs").[518] In December 1990, the FASB adopted SFAS-106, which requires companies to account for other post-retirement benefits on an accrual basis beginning December 15, 1992.[519] Prior to that time, companies had accounted for OPEBs on a cash payment basis. Under accrual methods, OPEBs are treated as deferred compensation that is earned by employees as they work. In addition to requiring accrual treatment for ongoing OPEBs, SFAS-106 requires companies to book the previously unaccrued OPEB amount for retirees and active employees as of the date that the company adopts SFAS-106. This amount is known as the transitional benefit obligation

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[514] LEC Price Cap Order, 5 FCC Rcd at 6808.

[515] LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2665.

[516] LEC Price Cap Order, 5 FCC Rcd at 6808; LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2665.

[517] See RAO Letter 22, 8 FCC Rcd 4111 (Com. Car. Bur., Accounting and Audits Div. 1993).

[518] Treating OPEB cost changes exogenously results in a permanent price cap increase of approximately $200 million.

[519] See Southwestern Bell Corporation, GTE Service Corporation, Notification of Intent to Adopt Statement of Financial Accounting Standards No. 106, Employers Accounting for Post-retirement Benefits Other Than Pensions, 6 FCC Rcd 7560 (Com. Car. Bur. 1991) (SFAS-106 Order).

(TBO).[520]

277. In November 1992, FASB adopted Statement of Financial Accounting Standards-112 (SFAS-112), which requires carriers to account for such post-employment benefits on an accrual basis beginning December 15, 1993.[521] Prior to that time, most companies recognized these costs only when payments were actually made. The Common Carrier Bureau required LECs to adopt SFAS-112 for regulatory accounting purposes no later than January 1, 1994.[522] Bell Atlantic has sought exogenous treatment of its SFAS-112 costs.[523]

278. On application of SWB and GTE, the Common Carrier Bureau found the SFAS-106 GAAP change consistent with Commission objectives and authorized the LECs to adopt it on or before January 1, 1993.[524] The Bureau also directed carriers to use the SFAS-106 option of spreading TBO amounts over prescribed periods of time, in order to avoid the distortion of LEC operating results from a one-time inclusion of the TBO amounts.[525]

279. In 1992, several LECs filed tariff revisions that increased their PCI levels and their rates to reflect the change caused by SFAS-106, asserting that these increments were exogenous costs. The Common Carrier Bureau suspended and investigated these tariff filings.[526] In the ensuing OPEBs

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[520] See 1993 Annual Access Tariff Filings, CC Docket No. 93-193, 8 FCC Rcd 4960, 4961 (Com. Car. Bur. 1993) (1993 Access Order).

[521] See RAO Letter 22, 8 FCC Rcd at 4111.

[522] Id.

[523] Bell Atlantic, F.C.C. Tariff No. 1, Transmittal No. 704, CC Docket No. 94-139, DA 95-193, para. 3 (Com.Car.Bur. released February 9, 1995).

[524] SFAS-106 Order, 6 FCC Rcd at 7560.

[525] Id. Under this option, LECs could either spread the TBO over a twenty-year period, or over the average remaining service period of active plan participants.

[526] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Post-retirement Benefits Other Than Pensions," 7 FCC Rcd 2724 (Com. Car. Bur. 1992).

Order,[527] the Commission denied the LECs' claims for exogenous cost treatment. The Commission denied exogenous cost treatment for ongoing expenses on the grounds that, although the accounting change was not within the carriers' control, the LECs had substantial control over the present and future benefit plans they set with their employees and the costs of these plans and, therefore the LECs had considerable control "over the level and timing of OPEB expenses."[528] With respect to the transitional obligation, the Commission held inter alia that the LECs had failed to demonstrate that the effects of SFAS-106 were not already reflected in the GNP-PI,[529] but said that it might consider treating OPEB TBO costs exogenously based on a better and more complete record.[530] A number of LECs argued for exogenous treatment of TBO costs in their 1993 annual access filings. The Common Carrier Bureau suspended those tariffs for one day and initiated an investigation of, among other things, whether the LECs had met their burden of showing that implementing SFAS-106 resulted in an exogenous cost change.[531]

280. On the LECs' appeal of the OPEBs Order, the United States Court of Appeals for the District of Columbia Circuit found that the Commission "arbitrarily and capriciously disregarded its own rule" in denying exogenous cost treatment for the LECs' cost changes wrought by SFAS-106.[532] With respect to the Commission's decision denying exogenous cost treatment for ongoing OPEB expenses, the court held that the "control test," as established by the Commission, for purposes of GAAP accounting changes is "satisfied simply by the fact of exogenous imposition of the accounting rule, without concern for the underlying costs covered by the rule. . . ."[533] The court therefore held that the

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[527] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Post-retirement Benefits Other than Pensions", CC Docket No. 92-101, 8 FCC Rcd 1024 (1993) (OPEBs Order), remanded sub nom., Southwestern Bell Tel. Co. v. FCC, 28 F.3d 165 (D.C. Cir. 1994) (Southwestern Bell).

[528] OPEBs Order, 8 FCC Rcd at 1033.

[529] Id. at 1034-35.

[530] Id. at 1037.

[531] 1993 Access Order, 8 FCC Rcd at 4961-63.

[532] Southwestern Bell, 28 F.3d 165.

[533] Id. at 170; see also id. (the court determined that, under the Commission's rules, "an FASB change adopted by the Commission is not a change under control of the carrier, and,

Commission's decision to deny exogenous cost treatment for the ongoing OPEBs cost changes based on the LECs' control over the underlying costs of the benefit plans was without foundation in the price cap rules.

281. With respect to the Commission's decision denying exogenous cost treatment for TBOs, the court found that the Commission invoked criteria not found in the exogenous cost rules and imposed "impossible burdens" as to GNP-PI double counting. In so holding, the court remanded to the Commission to consider the LECs' request for exogenous cost treatment of their SFAS-106 incremental costs in a manner consistent with the court's opinion and the Commission's own rules. After the court's remand, a number of carriers sought exogenous treatment for OPEB costs that they had not included in their 1993 annual access rates.[534]

282. In the Notice, we requested comment on whether the number of cost changes currently eligible for exogenous treatment under price caps should be reduced.[535] Specifically, we asked whether we should narrow the exogenous cost treatment of GAAP and USOA changes by limiting exogenous treatment to economic cost changes. We noted that GAAP changes of the type required by SFAS-106 may represent only a change in how books are kept and costs are recorded, not an economic cost change that might be expected to affect prices in competitive markets. We also noted that LECs, because they generally initiate exogenous cost change requests, have substantial incentives to report and request exogenous treatment only for those changes that might generate increases in the cap, not those that might justify cap decreases. In that regard, we asked whether only cost changes that solely affect telephone companies or similar companies such as utilities should be eligible for exogenous cost treatment, and whether price cap LECs should be required to recognize all such changes consistently and to report such changes as part of their required tariff filings. In addition, we solicited comment on whether we should adopt an administrative process to allow access customers or other groups to request exogenous treatment for cost changes.[536]

**2. Comments**

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once mandated by the Commission, the change satisfies the control criterion").

[534] See, e.g., Bell Atlantic Telephone Companies, et al., Memorandum Opinion and Order, CC Docket No. 94-157, DA 94-1613 (Com.Car.Bur., released Dec. 29, 1994).

[535] Notice, 9 FCC Rcd at 1699.

[536] Id.

283. Several commenters oppose limiting exogenous cost treatment to economic cost changes beyond the LECs' control, arguing that treating accounting cost changes endogenously might prevent LECs from recovering their true economic costs.[537] SWB asserts that it would be contradictory for the Commission to regulate the LECs based upon GAAP accounting, but to ignore the effects of future GAAP changes.[538] Pac Bell argues that, unless the Commission eliminates all vestiges of rate-of-return regulation from its price cap program, the Commission should continue to treat as exogenous changes to GAAP and the Commission's Part 32, 36 and 69 rules.[539] Pac Bell asserts that limiting exogenous cost treatment to "economic" cost changes might be difficult because there is disagreement among economists regarding how to determine "economic costs."[540]

284. NYNEX requests exogenous treatment for GAAP changes whenever LECs lack control over the event triggering the incremental cost change, rather than lack of control over the level of the underlying costs themselves.[541] GTE asserts that the LECs should not be required to absorb costs mandated by regulatory or legislative action that requires them to make uneconomic investments.[542]

285. US West advocates the elimination of exogenous cost adjustments after the expiration of existing adjustments. US West argues that they are a deviation from price cap regulation and that they undercut efficiency incentives. US West suggests that the rules could be modified or waived for events that have a dramatic effect on the telephone industry.[543]

286. WilTel and Ad Hoc recommend extending exogenous cost treatment only to economic costs directly attributable to regulatory actions that specifically and uniquely affect the

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[537] NYNEX Comments at 57; Bell Atlantic Reply at 20-22; USTA Comments at 85-86; GTE Reply at 37; RTC Comments at 22; BellSouth Comments at 55-56; Sprint Comments at 18-19; Ameritech Comments at 18-19; SNET Comments at 14.

[538] SWB Comments at 52-53.

[539] Pac Bell Comments at 53-55; Pac Bell Reply at 53.

[540] Pac Bell Comments at 54.

[541] NYNEX Comments at 62.

[542] GTE Comments at 78.

[543] US West Comments at 18-19.

LECs.[544] In response, NYNEX asserts that the ETI proposal, on which Ad Hoc bases its recommendation, is conceptually flawed. According to NYNEX, the ETI proposal seeks to make exogenous cost treatment similar to the manner nonregulated firms in competitive industries pass on costs in their rates, but does not seek to eliminate other aspects of the LEC price cap plan which NYNEX believes does not mirror the behavior of nonregulated firms.[545]

287. MCI believes that exogenous costs should be limited to Commission-ordered changes that result in a shift in costs between interstate and intrastate jurisdictions or between regulated and non-regulated operations. MCI says that this standard, by definition, would capture cost changes resulting from amendments to Parts 32, 36, or 64 of the Commission's Rules, but only if the cost changes produce a jurisdictional shift.[546] MCI argues specifically that all tax law changes, including industry-specific taxes, should be treated endogenously, contending that such tax changes are reflected in GNP-PI.[547] GTE asserts that the Commission has already rejected an argument by MCI that increased utility-specific taxes should be denied exogenous treatment absent a specific showing that the tax change is not reflected in the GNP-PI.[548]

288. AT&T and MCI request the Commission to treat fully amortized equal access network reconfiguration costs as exogenous costs.[549] AT&T asserts that the amortization of LEC equal access

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[544] WilTel Comments at 27; Ad Hoc Comments at 25-27. See also OCCO Comments at 10 (favoring elimination of the exogenous cost mechanism but, if it is retained, urging limitation of the mechanism to material factors impacting the LEC exclusively).

[545] NYNEX Reply at 54-56.

[546] Accordingly, MCI would treat as endogenous the completion of the amortizations of inside wire and the depreciation reserve deficiency, Transitional Support Fund obligations, all tax law changes, regulatory fees, and the discretionary category "other." MCI would treat equal access cost amortization exogenously, and would treat changes in the USOA or GAAP exogenously to the extent they meet the proposed test. MCI Comments at 42-48.

[547] MCI Comments at 43.

[548] GTE Reply at 40, citing Bell Atlantic Telephone Companies, 7 FCC Rcd 2165 (Com.Car.Bur. 1992).

[549] AT&T Comments at 46-48; MCI Comments at 47-48.

costs was completed on December 31, 1993.[550] NYNEX says that the Commission has already rejected this proposal in the 1994 Annual Access Order.[551] BellSouth argues that the amortization of equal access costs should be endogenous because it does not result from shifts of costs between jurisdictions or between regulated and nonregulated operations.[552] US West states that AT&T and MCI base their arguments on the incorrect assumption that LECs no longer incur equal access costs.[553] USTA asserts that, because the Commission has treated all equal access costs as endogenous, including those incurred after the start of price caps, it cannot now treat the expiration of the amortization of equal access network configuration costs as exogenous.[554]

289. CCTA recommends that the Commission continue to treat depreciation rate changes endogenously, to ensure that the LECs do not use accelerated depreciation to finance their video dialtone services.[555] BellSouth recommends eliminating exogenous treatment of inside wire amortization and depreciation reserve deficiencies approved by the Commission at the time price caps were initiated, because those amortizations are now completed. BellSouth also recommends, however, that if the Commission recognizes depreciation reserve deficiencies in the future and permits their amortization, such amounts should qualify for automatic exogenous treatment under Section 61.45(d)(1)(i) of the Commission's Rules, 47 C.F.R. § 61.45(d)(1)(i).[556]

290. CBT recommends preserving the current exogenous cost rules as part of the optional incentive regulation designed for small and mid-sized LECs, if the exogenous cost rules are revised.[557] Conversely, Bell Atlantic supports applying the same

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[550] AT&T Comments at 46-48.

[551] NYNEX Reply at 59-60, citing 1994 Annual Access Tariff Filings, CC Docket No. 94-65, 9 FCC Rcd 3519, 3535-36 (Com. Car. Bur. 1994) (1994 Access Order).

[552] BellSouth Reply at 29-30.

[553] US West Reply at 32-33.

[554] USTA Reply at 64. See also BellSouth Reply at 30.

[555] CCTA Comments at 2, 7-8.

[556] BellSouth Comments at 56.

[557] CBT Comments at 3, citing Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, CC Docket No. 92-135, 8 FCC Rcd 4545 (1993) (Small Company Order); Section 61.50 of the Commission's Rules, 47 C.F.R. § 61.50.

exogenous cost standards to all price cap LECs.[558]

291. OCCO, MCI, and ICA support the adoption of a new administrative process designed to give access customers and other groups the right to identify exogenous cost reductions.[559] ICA recommends requiring LECs to obtain approval for exogenous cost changes prior to the price cap tariff year.[560] NYNEX, USTA, BellSouth, and SWB say there is no need to adopt a new administrative process to allow access customers or other groups to request cost changes eligible for exogenous treatment because the current rules do not preclude any party from petitioning the Commission on matters related to exogenous cost treatment.[561] SWB and Pac Bell assert that the majority of the exogenous adjustments that were made based on changes in the levels of accounting costs have resulted in reductions in price cap indexes.[562] Ameritech avers that a mechanism that would allow customers to seek rate changes outside the context of a complaint of allegedly unreasonable rates would be inconsistent with the concept of carrier-initiated rates.[563]

### 3. Analysis

292. We tentatively conclude that, for the long term, the best approach to determining and calculating those costs which should receive "exogenous" treatment would be to adopt a price cap formula that recognizes such costs in the X-Factor. A properly designed X-Factor, such as one that is derived from a sound TFP, would recognize almost all of the costs for which exogenous treatment would now be accorded, leaving exogenous cost treatment requests only to cost changes which are truly unique to individual LECs. In the interim, however, we are faced with the issue of whether we can make the exogenous cost rule more consistent with the efficiency incentives price caps intended to produce without creating conditions in which rates would be unreasonably high or low. We believe that, by adopting a third prong to our exogenous cost test for cost changes resulting from changes in USOA requirements, we can improve on efficiency

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[558] Bell Atlantic Reply at 20-22.

[559] OCCO Comments at 11; ICA Comments at 18; MCI Comments at 49.

[560] ICA Comments at 16-17.

[561] NYNEX Comments at 63; USTA Comments at 87; BellSouth Comments at 57; SWB Comments at 54.

[562] SWB Comments at 53; Pac Bell Comments at 54.

[563] Ameritech Comments at 19.

incentives without resulting rates being unreasonably high or low.

293. In the Notice, we stated that we thought certain accounting changes resulted in only a change in how books are kept and costs are recorded, not in an economic cost change that might be expected to affect prices in competitive markets. Thus, we asked whether we should limit exogenous cost treatment for accounting rule changes to the economic cost of those changes to the LECs. Although most parties to this proceeding voiced more extreme views on either side of our proposal,[564] we believe that our original proposal strikes the best balance between promoting efficiency incentives and ensuring that the price cap formula does not lead to unreasonably high or low rates. Therefore, we will limit exogenous cost treatment of cost changes resulting from changes in USOA requirements to economic cost changes caused by administrative, legislative, or judicial requirements beyond the control of the carriers that are not reflected in the GDP-PI.

294. We believe the economic cost standard will narrow the exception exogenous cost treatment represents to the general principle that, under price caps, cost changes do not flow directly into rate changes. By narrowing this exception, efficiency incentives should improve. We select the economic cost standard because we believe it most fully comports with our reason for adopting exogenous cost treatment: to ensure that the price cap formula does not lead to unreasonably high or unreasonably low rates. That is, as explained more fully below, when an accounting change that otherwise meets the existing standards for exogenous treatment also affects cash flow, carriers will be able to raise PCIs to recognize this effect. Without a cash flow impact, carriers will not be able to raise PCIs to recognize an accounting change. Moreover, we believe that this result will produce correct pricing signals in the local telecommunications marketplace. Economic cost is the proper measure for guiding resource allocation decisions that will maximize net economic benefits.

295. Although Pac Bell suggests that economic cost is an inappropriate standard, we cannot agree. Most economists agree that an economic cost is the minimum payment necessary to attract

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[564] Most LECs argued that we should not make the exogenous cost standard any stricter. See e.g., GTE Comments at 78; NYNEX Comments at 57. However, other parties, such as IXCs and consumer groups, argue for a stricter exogenous cost standard. See e.g., WilTel Comments at 27; Ad Hoc Comments at 25-27.

a resource to its current use.[565] In other words, economic cost is based on the concept of opportunity cost -- the foregone benefits that would be produced if a resource were applied to its next best use instead of its current use. Opportunity costs may be difficult to measure in some contexts, but we are concerned here solely with the effects of changes in accounting rules. We conclude that for this purpose, a change in accounting rules that has an impact on a LEC's discounted cash flow represents a change in the LEC's economic costs and should be eligible for exogenous treatment. We believe that any changes in LEC opportunity costs attributable to changes in accounting rules will be reflected in changes in discounted cash flows. Conversely, an accounting change that does not affect a LEC's discounted cash flow does not represent a change in the LEC's economic costs and should not be eligible for exogenous treatment. Thus, we will require LECs seeking exogenous treatment of accounting cost changes to show that their cash flows have changed due to the accounting cost changes.[566] We emphasize, however, that we are deciding here only the use of the economic cost standard to assess the effects of changes in accounting rules. We are not addressing the use of this standard in other contexts.

296. Viewing this issue from the perspective of an investor illustrates the appropriateness of the standard we are adopting for assessing the eligibility of accounting rule changes for exogenous treatment. The value of a firm in equity markets (i.e., the price of the firm's stock) is based on the discounted cash flow (DCF) of all future payments by the firm to the shareholders. These payments, in turn, are based on the net value of streams of cash payments to and from the firm.[567] If an accounting change has no impact on a LEC's cash flow, an investor will earn the same return before and after the change, all other things being equal, and the value of the investors' equity will be unchanged as well. Thus, we find no public interest argument

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[565] For example, Nicholson defines economic cost as "that payment necessary to keep a resource in its present employment." W. Nicholson, Microeconomic Theory, Basic Principles and Extensions, Second Edition 222 (2d ed. 1978). Ekelund and Tollison define economic cost as "the value of the good or activity given up in place of the good or activity actually chosen." R. Ekelund, Jr. and R. Tollison, Economics Fourth Edition 4 (4th ed. 1994).

[566] We note that a number of LECs recognize the relationship between economic cost and cash flow. See e.g., SWB Comments at 52; Pac Bell Comments at 54-55.

[567] For a more detailed explanation of these principles, see generally R. Brealey and S. Myers, Principles of Corporate Finance (2d ed. 1984).

for changing the LEC's PCI in response to an accounting change that does not affect cash flows.

297. A number of LECs argue that, because their regulation is based on accounting costs, failure to recognize accounting cost changes exogenously might preclude them from recovering their "true economic costs."[568] GTE and BellSouth contend that we should continue to treat all accounting cost changes exogenously because the initial price cap rates were based on rates based on accounting costs under rate-of-return regulation.[569]

298. Our decision to retain this aspect of cost-plus regulation was appropriate for the beginning of the transition from rates based on regulatory accounting costs to rates that approximate the prices that would be produced in a competitive market. Exogenous treatment allowed the orderly completion of processes begun under rate-of-return regulation, such as the amortization of depreciation reserve deficiencies and the phasing-in of changes in the Separations Manual. It also avoided unfairly penalizing or rewarding carriers for uncontrollable cost changes during the first few years of price caps, when the prices they could charge were still strongly influenced by the initial rates established under rate-of-return regulation.

299. As time goes on, however, the rationale for continuing to allow exogenous cost changes to price cap rates is less compelling. As the pricing flexibility afforded by the price cap plan increasingly allows LECs to adjust rates to track economic costs, and to respond to competitive challenges, the link between current prices and the initial price cap rates should become more tenuous. This progress towards market-based rates, and away from rate-of-return regulation, will be impeded, however, if we continue indefinitely to allow exogenous cost adjustments that have the purpose and effect of perpetuating the relationship between accounting costs and rates that existed on July 1, 1990.

300. Moreover, we find these parties' analysis seriously incomplete. While the initial rates under price caps were indeed based on accounting costs, so too were the studies that led to the Commission's choice of the X-factor. A full analysis must establish both the extent to which the initial rates would have been different under the revised accounting rules, as well as the change in the X-factor and the effects of its application over the past four years. The same accounting changes that could be shown to have affected the initial rates for price caps would

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[568] GTE Reply at 37-38; SWB Comments at 51-53; Bellsouth Comments at 55.

[569] GTE Reply at 37; Bellsouth Comments at 55.

also affect the earlier data points used to estimate an X-Factor. A full analysis must take these X-Factor effects into account as well. For example, in theory, an accounting change that would have raised initial rates might also have raised the estimated X-Factor, potentially leading to lower rates today. No party has submitted a full analysis of these effects. Moreover, such a full analysis would be extremely complex and produce uncertain results, and thus could be impractical for either the Commission or the carriers to undertake.

301. SWB asserts that eliminating exogenous treatment of GAAP changes that require shifts from cash to accrual accounting could prevent recovery for the costs of a service at the time the service is provided.[570] We find this argument unpersuasive. It is a basic feature of price caps that most changes in the current cost of providing service are treated endogenously, that is, are not directly reflected in current prices. Even if, for example, accruals for future OPEB liabilities should be considered a current cost of providing service, it is consistent with the incentive structure of price caps to limit exogenous treatment of those accruals.

302. GTE argues that we should retain exogenous cost treatment for accounting cost changes because many LECs are still regulated based on accounting costs in many state jurisdictions.[571] Our treatment of accounting costs for interstate ratemaking purposes should have no effect whatever on state treatment of those costs. Also, we are continuing to treat cost changes resulting from Part 36 changes exogenously, at least on an interim basis. As a result, we conclude that differences in Federal and state regulations should not require us to treat accounting cost changes resulting from revisions in GAAP exogenously.

303. We decline to adopt, for this interim period, MCI's recommendation that we base our determinations regarding exogenous cost treatment solely on whether the cost change at issue results in a cost shift between jurisdictions. We defer consideration of this suggestion to the further notice. We also note in this regard that, even if we are able to develop an X-Factor that reflects all or most industry-wide cost changes now treated as exogenous, there may still be policy reasons to continue exogenous treatment of changes to the Separations Manual.

304. NYNEX recommends permitting LECs to treat exogenously any costs triggered by an event outside the carrier's control,

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[570] SWB Comments at 52.

[571] GTE Reply at 37-38.

regardless of whether the costs themselves are within the carrier's control. Similarly, GTE asserts that costs triggered by regulatory or legislative action that requires LECs to make uneconomic investments should be exogenous.[572] Such treatment would blunt the incentives to become efficient that led us to adopt price cap regulation. In the LEC Price Cap Order, we decided not to permit exogenous treatment of all "extraordinary" costs because it would reduce the carrier's need to be efficient and innovative.[573] We have found that the ability to cope with unforeseen events is at least in part a function of a carrier's managerial decisions, and that permitting exogenous treatment for such unforeseen events removes the incentive to operate more efficiently.[574] We also observe that firms subject to competition also face the risk that they will be required to make investments to satisfy legal or regulatory requirements and that they will not be able to raise prices to recover those investments. Neither GTE nor NYNEX has persuaded us to reconsider these conclusions. Accordingly, we will continue to treat these costs endogenously in most cases.[575]

305. Nor have AT&T and MCI persuaded us to treat as exogenous amortized equal access costs. In the 1994 Annual Access Order, the Bureau found that such treatment would "undercut the Commission's goal that the rates permitted under the price cap indexes be driven by competition and market economies."[576] AT&T also raised this issue in an application for review of the 1994 Annual Access Order. We conclude that the record in that proceeding would provide a better basis to consider this issue, and accordingly, we will not act on this issue here. BellSouth's concerns regarding exogenous treatment of amortization of depreciation reserve deficiencies which may be permitted at some time in the future is speculative. We need not determine whether such amortization will be permitted exogenous treatment unless and until we decide whether to permit

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[572] GTE Comments at 78.

[573] LEC Price Cap Order, 5 FCC Rcd at 6809-10.

[574] Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs, 9 FCC Rcd 377, 395 (1993).

[575] When we required LECs to provide 800 database service, we permitted them to treat a portion of their 800 database costs exogenously. Provision of Access for 800 Service, CC Docket No. 86-10, Second Report and Order, 8 FCC Rcd 907, 911 (1993). We do not foreclose the possibility that we may require the provision of other services in the future which may warrant similar treatment.

[576] 1994 Access Order, 9 FCC Rcd at 3535-36.

amortization at all.

306. In applying our new standard on a prospective basis, we believe that most accounting changes will not have an economic cost associated with them. Accounting changes often have no direct impact on the cash flow choices available to LECs or any other company. Financial accounting books are designed primarily to give the financial markets an accurate portrayal of the true economics of the corporation. Changes to the accounting books are merely an attempt to make the portrayal more accurate, not necessarily an attempt to make the company behave differently.

307. Applying this new standard prospectively, it appears that a large part of the accounting changes resulting from the adoption of SFAS-106 may not represent economic cost changes. LECs are not required to change their OPEB commitments to employees, but merely to change the timing of the recognition of these costs on their books.[577] That is, although accounting books may have changed, the LECs had the option of leaving cash flow unchanged. Unless LECs' cash flows were altered because of SFAS-106, we believe that SFAS-106 has had little or no effect on the opportunity cost and economic cost to LECs. Thus, it appears that most if not all of the ongoing cost changes resulting from the adoption of SFAS-106 will not be eligible for exogenous treatment under our revised rule on a prospective basis. Although this does not affect our pending investigations of exogenous cost claims based on OPEBs, LECs that believe that future accounting changes from SFAS-106 are entitled to exogenous treatment should follow the procedures, described below, for requesting such treatment under the revised rule.[578]

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[577] OPEBs Order, 8 FCC Rcd at 1037. In the OPEBs Order, the LECs submitted two studies purporting to show that SFAS-106 was not reflected in GNP-PI. One of those studies, the Godwins study, assumed that SFAS-106 resulted in an economic cost change. OPEBs Order, 8 FCC Rcd at 1034. In sharp contrast, the NERA study assumed that adoption of SFAS-106 does not change the LECs' economic costs. Id. We found that "[n]either study proves that its initial assumptions are in fact correct . . . ." Id. The court criticized the Commission for not adequately explaining why we found the initial assumptions of either study unproven. Southwestern Bell, 28 F.3d at 171-72. Although the court stated that the NERA study is not completely unsupported, id., it did not reach a conclusion on whether SFAS-106 resulted in an economic cost change or an accounting cost change. Therefore, we find that Southwestern Bell does not preclude a finding that adoption of SFAS-106 did not result in an economic cost change.

[578] We note that the court's decision in Southwestern Bell does not preclude our new rule. Indeed, the court there stated that, "whatever the intrinsic merits [its] bases for rejecting

308. Consistent with our new rule, we also conclude that LECs must adjust their PCIs to exclude prospectively any accounting cost changes currently reflected there for which carriers did not incur an economic cost, as defined above. For example, when we incorporated SFAS-106 into the USOA, we required carriers to amortize OPEB TBO amounts over periods of up to 20 years beginning on January 1, 1993.[579] Although we denied exogenous treatment to these costs initially, we invited LECs to make a further showing that the TBO amounts were not already reflected in the GNP-PI, and thus, that their PCIs should be adjusted by TBO amounts.[580] Subsequently, almost all of the LECs refiled tariffs including information to support inclusion of their TBO amounts in their PCIs. Although the tariffs were suspended for one day, they were allowed to take effect thereafter.[581]

309. Under the existing rule, the increase in LEC PCIs would be eliminated, i.e., the PCIs would be reduced, at the end of the amortization period because the LECs would have had the opportunity to fully recover these costs by that point in time. We have concluded here that OPEB cost changes are noneconomic cost changes, and thus, should not be reflected in carriers' PCIs prospectively. The tariffs in which TBO amounts were included have taken effect.[582] As a result of the tariffs taking effect, the LECs' PCIs increased by a certain percentage of the amortized TBO amounts, e.g., increased by one-twentieth, to permit recovery of the amortized amounts over the amortization period, e.g., twenty years. If we take no action today to remove those cost changes, the PCIs in the future would be inconsistent with the new rule. Thus, LECs must now adjust their PCIs downward to eliminate those amounts from prospective rates. Specifically, each LEC will be required to reduce its PCI by an amount equal to its original exogenous cost increase made pursuant to SFAS-106 for OPEB TBO costs. We require LECs to make this PCI adjustment in their next annual access tariff filing. This action is prospective only; it does not seek to reclaim revenues obtained up to this point under the LECs' filed tariffs. Those rates are subject to the pending tariff investigation, and their lawfulness will be judged under the rule in effect when the tariffs were

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exogenous cost treatment, the Commission is free to consider them as a basis for amending its current rule . . . ." (emphasis in original). Southwestern Bell, 28 F.3d at 173.

[579] SFAS-106 Order, 6 FCC Rcd at 7560.

[580] OPEBs Order, 8 FCC Rcd at 1037.

[581] 1993 Access Order, 8 FCC Rcd at 4974.

[582] Id.

filed. LECs that believe that any TBO amounts are entitled to exogenous treatment should follow the procedures, described below, for requesting such treatment under the revised rule.

310. Similarly, our pending investigation of Bell Atlantic's exogenous cost claim for cost changes resulting from SFAS-112 will fall under our current rule. Any future requests by a price cap LEC for exogenous cost treatment based on SFAS-112 will be governed by the revised rule.

311. In addition, we recently adopted an accounting change for allowance for funds used during construction (AFUDC).[583] It appears that such an accounting cost change is not an economic cost because it does not appear to affect real economic behavior nor decrease cash flow because of changes in economic costs. However, because we have not fully analyzed the effect of this change in regard to price caps, and because the rule has not gone into effect yet,[584] we will not make a final determination on this issue here.

312. In the Notice, we sought comment on procedures that would help assure that the LEC price cap plan treat cost increases and decreases fairly and consistently, for example by enabling access customers to bring to our attention cost changes which they believe warrant exogenous cost decreases.[585] We noted there that LECs have significant incentives to request exogenous cost treatment for cost changes that might increase their PCIs, but not to request exogenous cost treatment for cost changes that might decrease their PCIs. In that regard, we note that our rules should not result in only one-sided PCI changes. Rather, they should, as they were intended, result in both increases and decreases when warranted. Price cap LECs should decrease their PCIs when they have cost decreases for those categories of costs listed in our current rules. We believe that through the procedural process, we can meet this objective.

313. Currently, our rules list the specific cost changes that we examined in the original LEC price cap rulemaking and

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[583] The Accounting and Ratemaking Treatment for the Allowance for Funds Used During Construction (AFUDC), Report and Order, FCC 95-56 (released February 28, 1995).

[584] See 47 U.S.C. § 220(g) ("Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect."). The Report and Order appeared in the Federal Register on March 6, 1995. Thus, the rule does not take effect until September 6, 1995.

[585] Notice, 9 FCC Rcd at 1699.

concluded should be given exogenous treatment.[586] Other cost changes, such as changes in depreciation rates, were considered and excluded from the list, and thus from eligibility for exogenous cost treatment. Changes in these rules, or their application, require a rulemaking or grant of a waiver. In either case, all interested parties would have the opportunity to present and develop the relevant issues. Interested parties also would have the opportunity to review the specific calculation of the amount of cost changes that are found to be exogenous in subsequent LEC tariff filings.

314. In some cases, however, our current rules do not clearly resolve whether a cost change should be treated as exogenous. For example, although tax law changes and other "extraordinary" cost changes are listed in the exogenous cost exception section, exogenous treatment occurs only when the Commission "shall permit or require" such treatment.[587] No procedures are specified for determining whether exogenous treatment should be granted. This procedural vagueness has led to the issue being raised, inter alia, in a rulemaking, waiver petition, request for declaratory ruling, tariff filing, or petition against a tariff filing. Review may also be disjointed, for example when the issue of whether an access rule should be changed is considered in a rulemaking proceeding, but the issue of whether the change should be treated as an exogenous cost change is not raised in that proceeding, and must then be resolved in a further proceeding.

315. In addition, because this procedural lacuna permits LECs to submit these categories of proposed exogenous cost changes as tariff filings, in the hope the Commission will permit the proposed rates to take effect even if the rates are subject to an investigation, the tariff review process is made more cumbersome and more subject to manipulation. For this limited set of cost changes, the Commission or the Common Carrier Bureau must consider both the issue of whether exogenous cost treatment should be granted and of whether the LEC has computed the amount correctly in its PCI calculations. In most other cases, only the latter issue need be addressed in the tariff review process. Moreover, the fact that LECs may request exogenous cost changes in tariff filings creates one-sided incentives that lend themselves to abuse. LECs have strong incentives to request only

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[586] These include the amortization of depreciation reserve deficiencies, changes in the Separations Manual, changes in Long Term Support obligations, reallocation of investment from regulated to nonregulated activities, low-end adjustment amounts, inside wire amortization, and sharing. Section 61.45(d)(1) and (2) of the Commission's Rules, 47 C.F.R. §61.45(d)(1) and (2).

[587] Section 61.45(d)(1)(vi), 47 C.F.R. §61.45(d)(1)(vi).

exogenous cost increases, not those that may be equally valid but would lower their PCIs.

316. To remedy these problems, we believe we should apply consistent procedures for reviewing all proposals for new or revised exogenous costs, preferably in the same proceeding that considers the change that might justify the exogenous treatment. Thus, we believe that in all cases where a cost change for LECs may occur, the issue of whether or to what extent that change should also be treated as an exogenous cost change under price caps should be addressed in the same rulemaking proceeding. This procedure will allow all parties to contribute to our consideration of this issue along with the other issues associated with the change, just as they did when we drafted the list of exogenous costs in our current rules. For example, LECs, access customers, and other parties may all seek a rulemaking and participate in it. This procedure should also avoid the need for two separate, overlapping proceedings, one to consider the merit of the change and the second to consider whether the result should be considered exogenous under price caps. If exogenous treatment is found to be appropriate, the new or revised rule would then be included in the list of such changes in our rules.

317. In some cases, a cost change that might warrant exogenous treatment does not arise in a rulemaking. The change may, for example, be the result of a change in state tax law or an accounting change. In this instance, the appropriate procedure will be to seek either a waiver of our rules, in the event the change is not one contemplated by our current rules but the party believes exogenous treatment is nonetheless warranted, or a declaratory ruling, in the event the change is one that may be eligible for exogenous treatment depending upon the particular circumstances. Declaratory ruling would apply, for example, to tax law changes.

318. These procedures should provide a full and fair opportunity to determine whether the proposed adjustment to the price cap index calculations should be granted. LECs, access customers, and other interested parties may request the waiver or declaratory ruling, or participate in the proceeding.[588] At the same time, the procedures do not intrude on the LECs' ability to initiate new or revised rates. The procedures apply to the calculation of price cap LEC PCIs not to tariff rates, and only act to determine the tariff support and notice requirements that apply to new or revised tariff rates. They do not alter the LECs' right and opportunity to initiate rate changes. Moreover,

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[588] For an example of the issues a petitioner should address in seeking a waiver or declaratory ruling, see Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs, 9 FCC Rcd 377 (1993) and cases cited therein.

the effect is simply to replace the ad hoc and unclear procedures that currently apply to these categories of cost change, and to conform the procedures with those currently applied to other types of cost changes. Of course, LECs would not be permitted or required to revise their PCIs until the rulemaking, rule waiver process, or declaratory ruling proceeding was completed. We are revising the price cap rules to reflect these modifications of our exogenous cost procedures.

319. In the Notice, we also suggested that we might require all exogenous cost changes be submitted in the annual access tariff filings, not simply those required to be included by our current rules.[589] On reflection, however, we are concerned that this procedural requirement might unnecessarily delay the implementation of exogenous cost changes even after they have been found to be appropriate. The revised procedures we are adopting to assure an adequate record for determining the cost changes that should be treated as exogenous will also permit consideration of the implementation schedule that should apply in each case.

320. Finally, we conclude that CBT's proposal regarding optional incentive regulation is outside the scope of this proceeding. In the Notice, we did not solicit comments regarding making revisions to that incentive regulation plan. As a result, we have not developed a record in this proceeding that would permit us to consider such revisions. In addition, in a petition for reconsideration of the Small Company Order, USTA has raised the issue of whether to codify exogenous cost rules as part of Section 61.50.[590] As a result, the record in that proceeding provides a better basis on which to consider this issue. Therefore, we decline to revise the optional incentive plan at this time.

## C. Sales and Swaps of Exchanges

### 1. Background

321. A LEC that chooses price cap regulation must convert all of its affiliates that are not average schedule companies to

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[589] See Section 61.45(d)(3) of the Commission's Rules, 47 C.F.R. §61.45(d)(3).

[590] See USTA Petition for Partial Reconsideration and Clarification, August 5, 1993, at 17.

that system of regulation.[591] Once under price caps, a LEC may not revert to rate-of-return regulation, absent a Commission waiver.[592] These requirements were intended to prevent a LEC from shifting costs improperly from price cap affiliates to rate-of-return affiliates, or from attempting to "game the system" by alternating between rate-of-return regulation and price cap regulation.[593]

322. In the LEC Price Cap Order, we required any company resulting from the merger of a rate-of-return company and a price cap company, or resulting from one company acquiring the other, to file tariffs in compliance with price cap regulation within one year of the effective date of the transaction.[594] The Commission stated, however, that in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of "gaming the system," and determined that "[s]uch cases might justify a narrow waiver of the all-or-nothing rule."[595] A number of such waivers have been granted.[596]

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[591] Average schedule companies are small LECs which are permitted to charge rates derived from aggregate exchange carrier data, rather than developing rates based on their actual costs. See Sections 69.605 and 69.606 of the Commission's Rules, 47 C.F.R. § 69.605, 69.606; LEC Price Cap Order, 5 FCC Rcd at 6820.

[592] LEC Price Cap Order, 5 FCC Rcd at 6819. The requirement that all affiliates other than average schedule companies elect the same form of regulation is referred to as the "all-or-nothing" rule. The all-or-nothing rule was upheld in National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[593] LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2706.

[594] LEC Price Cap Order, 5 FCC Rcd at 6821; Section 61.42(c)(2) of the Commission's Rules, 47 C.F.R. § 61.42(c)(2).

[595] LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2706 n.207.

[596] See, e.g., US West Communications, Inc. and Eagle Telecommunications, Inc., FCC 95-4 (released Jan. 5, 1995) (Eagle Order); Citizens Utilities Company, GTE Northwest Incorporated, GTE California Incorporated, DA 94-1396, (Com. Car. Bur., Accounting and Audits Div., released Dec. 6, 1994) (Citizens Order); GTE Southwest Inc., and Pioneer Telephone Co-operative, Inc., DA 94-1365, (Com. Car. Bur., Accounting and Audits Div., released Dec. 1, 1994) (Pioneer Order); GTE Midwest Inc., and Winnebago Cooperative Telephone Association, DA 94-1366, (Com. Car. Bur., Accounting and Audits Div., released Dec. 1, 1994) (Winnebago Order); US West Communications, Inc. and Emery County Farmers' Union Telephone Association, 7 FCC Rcd 6076

323. In the Notice, we also observed that these sales of exchanges can improve efficiency and service quality, and can also promote better infrastructure development by placing exchanges in control of another LEC whose business plan reflects a greater commitment to improving service to customers served by the exchange involved in the transaction.[597] We were concerned, however, that the waivers may increase access rates unnecessarily.[598] A waiver that permits a price cap LEC to sell an exchange with relatively high costs and permits the buyer to move the exchange back to rate-of-return regulation, for example, may not reduce the price cap LEC's rates, but may permit higher, cost-based rates to be filed by the buyer. The transaction may also increase burdens on Commission support programs targeted to help small, high-cost exchanges such as the Universal Service Fund (USF) subsidies or the weighting of Dial Equipment Minutes (DEMs) used for jurisdictional separations by small companies.[599] The expectation of obtaining a waiver might also generate unintended incentives, such as encouraging a price cap LEC to postpone modernizing high-cost exchanges that it can sell to a cost-based company.[600]

324. In the Notice, we solicited comment on methods of preventing unintended windfalls and transactions that artificially increase subsidies, without unreasonably restricting efficient sales or swaps of exchanges. Specifically, we requested comment on whether, and how, the process for granting waivers of the price cap rules governing mergers and acquisitions, or the price cap rules themselves, should be revised so as to prevent unreasonable cost shifting and maintain the efficiency incentives of the LEC price cap plan.[601]

**2. Comments**

325. A number of commenters oppose changing either the rules governing mergers or acquisitions or the process for granting waivers of these rules. They argue that each individual

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(Com.Car.Bur. 1992) (Emery County Order); US West Communications and Gila River Telecommunications Inc., 7 FCC Rcd 2161 (Com.Car.Bur. 1992) (Gila River Order).

[597] Notice, 9 FCC Rcd at 1704.

[598] Id.

[599] Id., citing Section 36.125 of the Commission's Rules, 47 C.F.R. § 36.125.

[600] Notice, 9 FCC Rcd at 1704.

[601] Notice, 9 FCC Rcd at 1704 (Baseline Issue 10).

purchase, sale, merger, and acquisition is unique and requires review on a case-by-case basis.[602] PTI and NRTA assert that limiting or denying Commission support mechanisms to acquired exchanges would undermine infrastructure development.[603]

326. AT&T, MCI, and NTCA recommend requiring all price cap LECs that sell high cost exchanges to pass the resulting cost savings directly to their customers through an exogenous cost decrease.[604] In addition, MCI proposes requiring LECs either to demonstrate that there will be no effect on interstate access rates as a result of the transaction, or make an exogenous decrease to their PCIs equal to the additional subsidies the purchasing carriers receive from the DEM weighting and increased USF payments.[605] In its reply, BellSouth asserts that the sale of high cost exchanges is within the control of carrier management and therefore does not meet the threshold test for exogenous treatment.[606] USTA and PTI assert that MCI's proposals could unnecessarily discourage transactions that would otherwise have substantial public interest benefits.[607] PTI also notes MCI has made no representation or commitment to lower its rates if access charges decline.[608]

327. NRTA proposes that the Commission allow a rate-of-return LEC to acquire one or more exchanges from a price cap LEC and return them to rate-of-return regulation without a waiver as long as the acquired exchanges have fewer access lines than the

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[602] USTA Comments at 93; GTE Comments at 80; US West Reply at 36-37; SWB Comments at 5; BellSouth Comments at 70; RTC Comments at 24; OPASTCO Comments at 3; PTI Reply at 3-5; Ad Hoc Comments at 32.

[603] PTI Reply at 3-5; NRTA Comments at 4-7; see also USTA Comments at 93 (adoption of a new rule could unnecessarily discourage transactions that would otherwise have substantial public interest benefits).

[604] MCI Comments at 61-62; AT&T Comments at 51; NTCA Comments at 9-10. In general, MCI recommends treating as exogenous any cost change that results in shifting costs between jurisdictions. MCI Comments at 42-48. We consider MCI's recommendation in our discussion of Baseline Issue 6.

[605] MCI Comments at 61.

[606] BellSouth Reply at 30.

[607] USTA Reply at 67; PTI Reply at 2.

[608] PTI Reply at 3.

acquiring LEC.[609] NRTA also suggests that the Commission allow purchasing LECs to obtain additional USF support without triggering the temporary cap and indexing mechanism, arguing that these sales should not disadvantage other USF recipients.[610]

### 3. Analysis

328. We find that sales or swaps of exchanges should result in an exogenous adjustment to the price cap carrier's PCI. We recognize that exogenous treatment of cost changes resulting from sales or swaps of exchanges is a limited departure from our general standard for determining exogenous cost changes -- costs incurred by LECs as a result of administrative, legislative or judicial requirements beyond the control of the carriers and not otherwise reflected in GDP-PI.[611] However, we believe that this departure is necessary to maintain consistency with the concept of the price cap plan overall. In the LEC Price Cap Order, we explained that we adopted price cap regulation in part to give LECs incentives to become more efficient and innovative in their provision of services.[612] Our intent was to design a regulatory system that would mirror the efficiency incentives found in competitive markets.[613] We intended this incentive to induce carriers to develop more cost-effective ways to provide service to their customers. We did not intend to induce carriers merely to sell high-cost portions of their operations to rate-of-return carriers that can recover all of their costs from ratepayers. Without more, we do not view such sales as innovations or

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[609] NRTA Comments at 6.

[610] NRTA Comments at 6-7. The "temporary cap and indexing mechanism" referred to by NRTA limits growth in the Universal Service Fund during 1994 and 1995 to a rate equal to the rate of growth in working loops. This mechanism was adopted pursuant to a joint board recommendation in December 1993. See Section 36.601(c) of the Commission's Rules, 47 C.F.R. § 36.601(c); Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 9 FCC Rcd 303 (1993) (Interim Order).

[611] See Section V.E. of this Order below.

[612] LEC Price Cap Order, 5 FCC Rcd at 6790. As in the LEC Price Cap Order, we do not define "innovation" narrowly to apply only to technological breakthroughs that lead to new services or offerings. Rather, our definition incorporates innovations in management systems, administration, or in any other economic "input" that is used to produce the firm's "output." See LEC Price Cap Order, 5 FCC Rcd at 6790.

[613] LEC Price Cap Order, 5 FCC Rcd at 6790.

efficiency gains by price cap LECs which deserve to be rewarded with increased profits. To the extent that price cap regulation may create a perverse incentive for price cap LECs to sell off higher-cost exchanges, requiring a downward exogenous adjustment should correct this incentive.

329. Recently, US West proposed, in conjunction with a petition for waivers of the study area freeze and of the mergers and acquisitions rule, to make an exogenous cost reduction to its PCI equal to the net interstate revenue requirement reduction resulting from the sale of 43 exchanges to Eagle Telecommunications, Inc. (Eagle).[614] Because these exchanges comprised parts of study areas rather than whole study areas, the transfer of those exchanges to other LECs would have altered the boundaries of US West's existing study areas.[615] It therefore

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[614] US West indicated that, in each of the affected study areas, the PCI adjustment would equal the reduction in net interstate revenue requirements resulting from the sale of exchanges. Letter from Laura Ford, US West, to Kathleen Levitz, Acting Chief, Common Carrier Bureau, August 6, 1993 (US West Aug. 6 Letter); Letter from Laura Ford, US West, to A. Richard Metzger, Acting Chief, Common Carrier Bureau, June 23, 1994 (US West June 23 Letter); Letter from Lawrence Sarjeant, US West, to Kathleen Wallman, Chief, Common Carrier Bureau, January 24, 1995 (US West Jan. 24 Letter).

[615] A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers operating in more than one state typically have one study area for each state, and carriers operating in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission adopted a rule freezing study area boundaries effective November 15, 1984. Part 36 of the Commission's Rules, 47 C.F.R., Part 36, Appendix-Glossary, definition of "Study Area." See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (1984 Joint Board Recommendation), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (1985 Order Adopting Recommendations). See also Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (Study Area Notice). The Commission took that action, in part, to ensure that LECs do not create high-cost exchanges within their existing service territories as separate study areas to maximize high-cost support. See 1985 Order Adopting Recommendations, 50 Fed. Reg. 939, 940. See also 1984 Joint Board Recommendation, 49 Fed. Reg.

was necessary for US West to obtain six waivers of the rule freezing study area boundaries.[616] In each case, the study area waiver was conditioned on US West's compliance with its representation that the exogenous cost reduction would be made.

330. We have a related concern when whole study areas are bought or sold. Because some price cap LECs apply a single PCI to a region containing many study areas, those LECs could increase their returns under price cap regulation by selling off the higher-cost study areas to rate-of-return LECs without making downward adjustments in their PCIs. Hence, price cap regulation could contain a perverse incentive for price cap LECs to sell whole study areas, without corrective action by this Commission. Accordingly, in the future, conditions regarding exogenous cost adjustments related to sales or swaps of exchanges will attach to any necessary waivers of the price cap merger and acquisition rules as well as to study area waivers. We will grant a waiver of the price cap merger and acquisition rules to a rate-of-return LEC buying all or part of a study area from a price cap LEC only on the condition that the selling price cap LEC make a downward exogenous cost adjustment to remove the effects of the transferred properties from price-capped rates that were based, in whole or in part, upon the inclusion of those exchanges within the price-capped study areas, because only then would the waiver be in the public interest.

331. We conclude that requiring an exogenous cost decrease equal to the increase in subsidies the purchasing carriers receive from the DEM weighting and increased USF payments, as MCI suggests,[617] would not be appropriate. Increases in subsidies paid to the purchasing carrier would not be related to any cost changes experienced by the price cap seller. Rather, the

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48325, 48337. The study area freeze also prevents LECs from decomposing, and recombining, study areas to increase interstate revenue requirements and exchange carrier compensation.

[616] US West and Central Utah Telephone, 9 FCC Rcd 194 (Com.Car.Bur. 1993); US West and South Central Utah Telephone Assoc., Inc., 9 FCC Rcd 198 (Com.Car.Bur. 1993); US West and Triangle Telephone Cooperative, Inc., et. al., 9 FCC Rcd 202 (Com.Car.Bur. 1993); US West and Nemont Telephone Cooperative, Inc., 9 FCC Rcd 721 (Com.Car.Bur. 1994); US West and Range Telephone Cooperative, Inc., et. al. 9 FCC Rcd 4811 (Com.Car.Bur. 1994); and Eagle Order. See also Winnebago Order at para. 17; Pioneer Order at para. 17 (GTE stated that it had made an exogenous cost adjustment to reflect the sale of certain exchanges); Citizens Order at para. 20 (GTE stated that it will make such an exogenous cost adjustment).

[617] MCI Comments at 61.

increased amounts paid to the acquiring carrier would reflect the application of the current USF and other rules to the changed circumstances of that carrier. In the case of the US West/PTI transaction, for example, the impact of the sale on the USF was attributable to the cost characteristics of Eagle after the transaction was completed. We originally adopted an exogenous cost mechanism because we were concerned that the price cap formula might, over time, lead to unreasonably high or low rates without such a mechanism.[618] In other words, we did not want the price cap formula to reward or penalize carriers unjustly for certain specific events that are outside their control, and therefore are not the result of increases or decreases in their efficiency.[619] As explained above, sales or swaps of exchanges may result in cost savings which are not really related to efficiency gains, and therefore warrant an exogenous adjustment to avoid rewarding the selling price cap LEC. Increases in USF payments to the purchasing LEC do not unjustly reward or penalize the selling price cap LEC, and therefore do not warrant exogenous cost adjustments.

332. We remain concerned that our current USF and separations rules may unduly encourage the sale of high-cost exchanges by large LECs to small, high cost LECs; create artificial incentives in favor of sales of high-cost exchanges; or create undue disincentives to otherwise efficient mergers that would result in decreased subsidy flows. These concerns existed before we adopted price cap regulation, however, and are not limited to transactions involving a price cap LEC. We therefore conclude that we should defer consideration of USF-based and separations-based incentives to other pending and future proceedings. For example, we have recently released a Notice of Inquiry soliciting comments generally on whether to revise the rules governing high cost assistance from the Universal Service Fund.[620] We will consider some of these issues in that proceeding.

333. We do not conclude at this time that all sales or swaps of exchanges result from perverse incentives created by our price cap regulation. For example, in the Eagle Order, we recently found the particular transaction at issue to have

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[618] LEC Price Cap Order, 5 FCC Rcd at 6807.

[619] We specifically declined to extend exogenous treatment to all events outside the carrier's control, because to do so would reduce the carrier's need to be efficient. LEC Price Cap Order, 5 FCC Rcd at 6809-10.

[620] See Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 9 FCC Rcd 7404, 7410 n.14 (1994) (USF Rulemaking).

identifiable public interest benefits.[621] Furthermore, many of the transactions we have reviewed did not raise the concerns we identified in adopting the "all-or-nothing rule." Specifically, the parties to the transactions at issue did not seek to maintain both price cap affiliates and rate-of-return affiliates simultaneously. Hence, there was no opportunity to shift costs between affiliates. Nor did those transactions, when examined on a case-by-case basis, appear to create opportunities for carriers to shift back and forth between price cap regulation and rate-of-return regulation.[622] No party suggests that we should discontinue the practice of granting waivers in appropriate cases. Accordingly, we will not revise our rules to discourage or prohibit all sales and swaps of exchanges, or to place new limits on the availability of waivers of the mergers and acquisitions rule.

334. Finally, we reject NRTA's proposal to allow rate-of-return LECs to acquire one or more exchanges from a price cap LEC and return them to rate-of-return regulation without a waiver as long as the acquired exchanges have fewer access lines than the acquiring LEC.[623] Our concerns about using transactions to "game the system" are in no way answered by limiting the sales of exchanges to those with fewer access lines than the acquiring LEC. Such a rule can readily be defeated by dividing a large purchase into a series of small transactions, each of which escapes our review. In light of this risk, and in the absence of anything in NRTA's comments that would lead us to conclude that "gaming the system" need not concern us, we decline to adopt NRTA's proposal.

## D. Equalization of Regulations for LECs and CAPs

### 1. Background

335. Under the AT&T price cap plan, changes in the charges

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[621] Eagle Order at para. 19 (Eagle intended to upgrade and modernize the facilities that serve the exchanges at issue). See also, e.g., Gila River Order, 7 FCC Rcd at 2162 (sale resulted in telephone service to 600 subscribers on Indian reservation who had no access to service previously); Pioneer Order at para. 12. (purchaser intends to, inter alia, begin providing equal access in some exchanges by June 1996, construct 12 new digital central offices, and add fiber for both toll and subscriber use).

[622] See, e.g., Gila River Order, 7 FCC Rcd at 2164; Emery County Order, 7 FCC Rcd at 6078; Golden West Telecommunications Cooperative, Inc., 8 FCC Rcd 6325, 6326 (Com.Car.Bur. 1993); Lynch Corporation, 8 FCC Rcd 7051, 7051 (Com.Car.Bur. 1993).

[623] NRTA Comments at 6.

that AT&T pays for access to the LECs' networks are deemed exogenous and, therefore, result in an adjustment to the AT&T price cap indexes.[624] Cost changes resulting from an AT&T decision to bypass the local network and cost changes in non-LEC access charges were not made exogenous, however, and thus AT&T does not adjust its indexes for these costs. In the past, we have considered and rejected proposals for treating LEC and CAP access charges alike, because the small scale of CAP services and competition among IXCs would prevent any actual bias in favor of uneconomic bypass of LEC networks.[625] Also, we determined that limiting exogenous treatment to LEC access cost changes created incentives for AT&T to negotiate efficient access arrangements.[626]

336. In the Expanded Interconnection Second Report and Order, the Commission adopted rules requiring Tier 1 LECs,[627] except National Exchange Carrier Association (NECA) pool members, to provide expanded interconnection for switched transport services to all interested parties.[628] In the Notice in this proceeding, we expressed concern that the rules for computing AT&T's exogenous access costs might create an actual bias in the development of switched transport competition.[629] Accordingly, we requested comment on whether our current rules for computing

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[624] AT&T Price Cap Order, 4 FCC Rcd at 3005. See also Price Cap Performance Review for AT&T, Report, CC Docket No. 92-134, 8 FCC Rcd 5165, 5168-69 (1993) (AT&T Performance Review).

[625] AT&T Performance Review, 8 FCC Rcd at 5168, citing AT&T Price Cap Order, 4 FCC Rcd at 3037; AT&T Price Cap Reconsideration Order, 6 FCC Rcd at 673.

[626] Id.

[627] Tier 1 LECs are companies having annual revenues from regulated telecommunications operations of $100 million or more for a sustained period of time. Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs, 5 FCC Rcd 1364, 1364 (Com. Car. Bur. 1990) (defining Tier 1 LECs using the criteria to define Class A companies in 47 C.F.R. §§ 32.11(a) and 32.11(e)).

[628] See Expanded Interconnection with Local Telephone Company Facilities and Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-141, Transport Phase I, 8 FCC Rcd 7373 (1993); see also Expanded Interconnection with Local Telephone Company Facilities, CC Docket 91-141, 9 FCC Rcd 5154 (1994) (Virtual Collocation Order).

[629] Notice, 9 FCC Rcd at 1703.

AT&T's exogenous access costs should be revised to equalize the treatment of LEC and CAP access rates in the calculation of AT&T's exogenous access costs.[630] We also requested comment on whether any other rules or policies that relate to LEC price cap regulation should be revised to equalize our treatment of LECs and CAPs.[631]

**2. Comments**

337. Some CAPs and other commenters oppose revising the exogenous cost rules to equalize the treatment of LEC and CAP access charges imposed on AT&T.[632] Several commenters expect AT&T to continue to purchase the bulk of its switched access from the LECs, and argue that there is no justification for changing the current rules.[633] TCG claims that requiring AT&T to track CAP charges separately and to calculate adjustments to its PCI to reflect changes in CAP rates would create a disincentive for AT&T to use CAP facilities.[634] ICA maintains that competitive pressure is sufficient to force AT&T to pass through access charge reductions in its business service rates. Accordingly, ICA suggests that, if the Commission revises AT&T's exogenous cost rules at all, then the pro-rated percentage change in AT&T's average access cost per minute for all switched services should be used as an adjustment only to the basic MTS services.[635]

338. USTA and many LECs argue that the current rules provide a substantial incentive for AT&T to bypass LEC networks, and recommend that the Commission equalize the exogenous cost treatment of LEC and CAP access charges.[636] US West, Pac Bell, and Ameritech maintain that the CAPs are a significant competitive threat to the LECs, and that the Commission's reason

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[630] Notice, 9 FCC Rcd at 1703 (Baseline Issue 9a).

[631] Notice, 9 FCC Rcd at 1703 (Baseline Issue 9b).

[632] TCG Comments at 13; Hyperion Reply at 8-9; Ad Hoc Comments at 30; AT&T Comments at 46-47.

[633] Ad Hoc Comments at 30-31; TCG Comments at 13; Hyperion Reply at 8-9.

[634] TCG Comments at 13-14.

[635] ICA Comments at 23.

[636] USTA Comments at 89; US West Comments at 58-59; Bell Atlantic Comments at 29; NYNEX Comments at 51; BellSouth Comments at 66-67; Ameritech Comments at 27; Pac Bell Comments at 65-66; GTE Reply at 75-76.

for refusing to treat CAP charges exogenously is no longer valid.[637]

339. MCI advocates permitting AT&T to treat endogenously the reduction in its access costs resulting from changing access providers, but requiring AT&T to treat as exogenous any changes in the rates that a current access provider charges, regardless of whether the current provider is a LEC or a CAP. MCI argues that this would encourage AT&T to be efficient in its selection of access providers, but not penalize AT&T for access cost changes outside its control after it has selected its provider.[638] MCI also contends that requiring AT&T to pass through the savings resulting from changing access providers would lessen AT&T's incentive to switch access providers, thereby strengthening the LECs' current monopoly of the transport market.[639]

340. As for other issues, some of the LECs argue that the Commission should permit the LECs the same pricing flexibility that it allows their competitors, i.e., to offer bundled services and equipment, volume and term discount plans, and a range of rates in their tariff filings.[640] SWB asserts that the current asymmetrical treatment regarding pricing flexibility denies price cap LECs equal protection under the law.[641] A number of carriers assert that they are placed at a competitive disadvantage because their rate structures are dictated by the Part 69 access charge rules, and their competitors are free to adopt any rate structure they choose.[642] Many carriers also request reduced notice periods for LEC price cap tariff filings.[643] Many LECs also contend that the cost support, demand information, service

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[637] US West Comments at 60-61, citing AT&T Price Cap Order, 4 FCC Rcd at 3029; Ameritech Comments at 28; Pac Bell Comments at 66.

[638] MCI Comments at 57-58.

[639] MCI Reply at 68-69.

[640] Bell Atlantic Reply at 27; USTA Comments at 90; SNET Comments at 11; Pac Bell Comments at 66; Lincoln Comments at 5; NYNEX Comments at 52; Bell Atlantic Comments at 23; SWB Comments at 56; Ameritech Comments at 28; RTC Comments at 16.

[641] SWB Comments at 56.

[642] USTA Comments at 90; Lincoln Comments at 5; SWB Comments at 56; BellSouth Comments at 67.

[643] USTA Comments at 90; Lincoln Comments at 5; NYNEX Comments at 52; Bell Atlantic Comments at 23; SWB Comments at 57.

quality reports, and other similar reporting requirements unfairly provide their competitors with market intelligence about networks, costs, and customers.[644] USTA, SWB, and CSE contend that, while LEC depreciation rates are established by Commission proceeding, LEC competitors are permitted to set their own depreciation rates.[645]

341. Some commenters suggest that all interstate access providers (and not just the LECs) should be required to provide the Commission with a description of their geographic service areas and a list of their services, to enable the Commission to assess the level of competition in local exchange markets.[646] Similarly, Pac Bell claims that the distinction the Commission made between nondominant and dominant carriers in CC Docket No. 93-36 is not based on evidence from actual markets. Pac Bell avers that an examination of markets by service and geography would have shown that in some metropolitan markets the LECs are not dominant.[647]

342. Ad Hoc, TCG, MCI, Sprint, and MFS assert that the Commission should not equalize LEC and CAP treatment as long as the LECs still retain market dominance and control over essential facilities and resources.[648] MCI argues that, if regulation is eased before local service and access providers can establish themselves within the market, the LECs will be able to thwart emerging competition.[649] MCI also recommends that, if the Commission requires the CAPs to file reports disclosing customer-specific marketing plans, such reports should be given

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[644] GTE Reply at 74; USTA Comments at 91; Pac Bell Comments at 56-58; SWB Comments at 63; US West Comments at 50.

[645] USTA Comments at 91; SWB Comments at 57; CSE Reply at 4.

[646] USTA Comments at 91; Pac Bell Comments at 69; SWB Comments at 59; US West Comments at 64.

[647] Pac Bell Comments at 66-67, citing Tariff Filing Requirements of Nondominant Common Carriers, CC Docket No. 93-36, 8 FCC Rcd 6752 (1993) (Nondominant Tariff Requirements Order). In that Order, the Commission amended its rules to allow domestic nondominant carriers to state in their tariffs a reasonable range of rates. Those rules were later struck down by the Court of Appeals for the District of Columbia Circuit. Southwestern Bell Corp. v. FCC, 1995 WL 19336 (D.C. Cir., decided Jan. 20, 1995).

[648] Ad Hoc Comments at 31; MFS Comments at 33; MCI Comments at 59; Sprint Comments at 22; TCG Comments at 14.

[649] MCI Reply at 71.

proprietary treatment.[650]

### 3. Analysis

343. When we last reviewed the exogenous treatment of AT&T access costs in the AT&T Performance Review, we recognized that this difference in treatment of LEC and CAP access charges could have the effect of biasing competition among access providers. We declined to revise the rule, nonetheless, as several LECs recommended. We noted that almost all of AT&T's Basket 2 and Basket 3 services have been removed from price cap regulation.[651] This reduces the likelihood that any actual bias exists, because the services remaining under price cap regulation are in Basket 1, and those services use LEC switched access services almost exclusively.[652] Finally, we concluded that there was no evidence to indicate that making exogenous cost changes to reflect changes in CAP access rates would have any effect on AT&T's Basket 1 PCI, and thus have no effect on AT&T's incentives.[653]

344. Similarly, no evidence has been submitted in the record of this proceeding that demonstrates that AT&T's use of CAP access to provide Basket 1 services is more than de minimis. Consequently, we cannot conclude at this time that reflecting changes in CAP access rates as exogenous cost adjustments to AT&T's Basket 1 PCI would have any measurable effect on that index or affect AT&T's incentives to choose either a LEC or a CAP for its access provider. We also cannot conclude that exogenous treatment of LEC access rates creates any actual bias in the development of switched transport competition. Accordingly, we continue to find no basis for concluding that the current rule should be modified. We may revisit this issue in the future, however, as competition in the provision of switched transport service develops.

345. In the Notice, in addition to the baseline issues we discuss here, we solicited comment on six "transition issues," to develop data and information relevant to fashioning a workable plan for revising LEC price cap regulation as competition in the market for access services develops.[654] As we discuss above, we also intend to issue a further notice of proposed rulemaking to solicit further comment on a number of transition issues,

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650 Id.

651 AT&T Performance Review, 8 FCC Rcd at 5169.

652 Id.

653 Id.

654 Notice, 9 FCC Rcd at 1705-06.

including whether any particular price cap rules or policies should be revised as competition develops in local exchange markets. Because the upcoming further notice proceeding can examine more thoroughly the proposals for equalizing LEC and CAP regulation, we will not address the merits of these proposals here.

346. Finally, we note that, since this proceeding was initiated, the Commission has addressed the concern expressed here by several commenters that all interstate access providers should provide information to the Commission that would enable us to assess the level of competition in the local exchange markets. In the Virtual Collocation Order, we delegated authority to the Common Carrier Bureau to initiate a monitoring program to enable us to monitor the development of competition in interstate access markets.[655] As for Pac Bell's assertion that we did not distinguish between "dominant carrier" and "nondominant carrier" correctly in the Nondominant Tariff Requirements Order, we specifically declined in that Order to revise the definition of dominance developed in the Competitive Carrier proceeding.[656] The Commission in the Nondominant Tariff Requirements Order intended only to revise the tariff filing requirements in light of the Court decision invalidating our "forbearance" rules,[657] not to revisit the definition of "nondominant carrier" itself.[658] To the extent that Pac Bell requests us to reconsider any

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[655] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 9 FCC Rcd 5154, 5177 (1994) (Virtual Collocation Order).

[656] Nondominant Tariff Requirements Order, 8 FCC Rcd at 6754. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) (First Report); Second Report and Order, 91 FCC 2d 59 (1982) (Second Report); Third Report and Order, 48 Fed. Reg. 46,791 (1983) (Third Report); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report), vacated sub nom. AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), reh. en banc denied, January 21, 1993; Fifth Report and Order, 98 FCC 2d 1191 (1984), recon. 59 Rad. Reg. 2d 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1983) (Sixth Order), reversed sub nom. MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (Competitive Carrier).

[657] Id., citing AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992) (Forbearance Decision), cert. denied, 113 S.Ct. 3020 (1993). Under the forbearance rules, the Commission permitted nondominant carriers to provide service without filing tariffs.

[658] Nondominant Tariff Requirements Order, 8 FCC Rcd at 6754.

conclusion we reached in the Nondominant Tariff Requirements Order, this is not the appropriate proceeding to do so.

**E. The Inflation Measure: GNP-PI or GDP-PI**

347. The Commission's price cap formula for LECs uses the U.S. Department of Commerce, Bureau of Economic Analysis' 45-day estimate of the Gross National Product Price Index (GNP-PI) as its inflation measure.[659]

348. USTA and several LECs recommended that the Commission replace the GNP-PI with the Gross Domestic Product Price Index (GDP-PI).[660] As explained by SWB, the GNP-PI is based upon production by U.S. firms, including overseas production, while the GDP-PI excludes overseas production by U.S. firms and includes domestic production by foreign-owned firms.[661] Data provided by SWB and USTA demonstrate that, from 1982 to 1993, there has been only a slight difference between the GNP-PI and the GDP-PI.[662]

349. The commenters state that, beginning in 1991, the U.S. Department of Commerce discontinued publication of the 45-day estimate of the GNP-PI, substituting for it a 45-day estimate of the GDP-PI.[663] They further state that estimates of the GNP-PI are not released timely enough for the LECs to incorporate them in their annual access tariff filings.[664] As a result, the commenters assert that most LECs now use the 45-day GDP-PI estimate in their annual access tariff filings and then adjust it when the GNP-PI figures become available.[665]

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[659] Sections 61.3(p) and 61.45(c) of the Commission's Rules, 47 C.F.R. §§ 61.3(p), 61.45(c); 5 FCC Rcd at 6793.

[660] USTA Comments at 95-96; NYNEX Comments at 66-67; Pac Bell Comments at 34-35; BellSouth Comments at 71; SWB Comments at 65-67.

[661] SWB Comments at 65; USTA Comments at 96.

[662] Pac Bell Comments at 35; NYNEX Comments at 66; SWB Comments at 66; USTA Comments at 96.

[663] NYNEX Comments at 66; USTA Comments at 95; SWB Comments at 65; BellSouth Comments at 71.

[664] NYNEX Comments at 66-67; USTA Comments at 95; SWB Comments at 65; BellSouth Comments at 71.

[665] NYNEX Comments at 67; USTA Comments at 95; SWB Comments at 66; BellSouth Comments at 71.

350. The commenters argue that replacing the GNP-PI with the GDP-PI would eliminate an unnecessary administrative burden and have no material effect on the price cap indexes.[666] No commenting parties opposed this change.

351. We find that the substitution of GDP-PI for GNP-PI in the price cap formula will eliminate a needless administrative burden without causing any harm to the public. We, therefore, adopt this revision to the LEC price cap plan.

**F. Service Quality, Infrastructure Monitoring and Network Reliability**

**1. Background**

352. The Commission concluded in adopting price cap regulation for LECs that the increased profits available under this form of regulation would create investment incentives that would promote the development of high quality, innovative services and an advanced telecommunications infrastructure.[667] At the same time, we recognized our responsibility to ensure that cost-cutting by price cap carriers did not instead lead to degraded service and diminished investment in network modernization. We therefore expanded our monitoring of service quality and infrastructure development in order to ensure continued high quality service to ratepayers.[668]

353. The Commission requires all price cap LECs to file quarterly service quality reports and all mandatory price caps LECS to file semi-annual service quality reports and annual infrastructure reports.[669] In addition, the Commission has adopted network reliability reporting requirements that apply to all carriers. These rules require, inter alia, local exchange or interexchange common carriers or competitive access providers operating either transmission or switching facilities to notify the Commission within 120 minutes if they experience service outages potentially effecting 50,000 or more customers and lasting 30 or more minutes and within three days if they experience service outages potentially effecting 30,000 to 50,000

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[666] NYNEX Comments at 67; USTA Comments at 95-96; SWB Comments at 66-67; BellSouth Comments at 71; Pac Bell Comments at 35.

[667] LEC Price Cap Order, 5 FCC Rcd at 6827.

[668] LEC Price Cap Order, 5 FCC Rcd at 6827, 6829-30, Order on Reconsideration, 6 FCC Rcd at 2717-19.

[669] LEC Price Cap Order, 5 FCC Rcd at 6827-39.

customers.[670] The Commission investigates all such reported outages.

354. The quarterly service quality report includes information regarding installation and repair intervals for interexchange access and local service, trunk, blockage, switch downtime, and service quality complaints filed with state or federal regulatory authorities.[671] We require price cap LECs to file their quarterly service quality reports by study area,[672] and to disaggregate data within the report by MSA and non-MSA for purposes of (1) local service installation and repair intervals, (2) switch downtime, and (3) service quality complaints.[673] We also require price cap LECs to disaggregate switch downtime data by switch size (number of lines served), and to report fully switch downtimes of two minutes or more and to identify the individual switch involved in the incident. In addition, we require price cap LECs to disaggregate interexchange access installation and repair intervals data by special access and switched access.[674] The semi-annual service quality report is filed by study area, and contains information concerning customer satisfaction, dial tone response and transmission quality.[675]

355. The annual infrastructure report[676] provides

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[670] Section 63.100 of the Commissions's Rules, 47 C.F.R. § 63.100; Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions, 7 FCC Rcd 2010, 2010 (1992) (Service Outage Order), recon. denied and granted, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 8517 (Service Outage FNPRM) (1993); Second Report and Order, 9 FCC Rcd 3911 (1994).

[671] Modified Service Quality Order, 8 FCC Rcd 7259, Attachment, FCC Report 43-05.

[672] A study area usually consists of a telephone company's service territory in a given state, although telephone companies occasionally have more than one study area in a particular state.

[673] Modified Service Quality Order, 8 FCC Rcd 7259, Attachment, FCC Report 43-05.

[674] Id.

[675] Modified Service Quality Order, 8 FCC Rcd 7259, Attachment, FCC Report 43-06.

[676] The LECS are required to file their service quality and infrastructure reports in the Automated Reporting Management Information System (ARMIS) format. See Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies

information relating to switching equipment, transmission facilities, LEC call set-up time, access lines in service, access line gain, and total gross capital expenditures.[677] We require the mandatory price cap LECs to file infrastructure reports by study area and to disaggregate switching equipment data by MSA and non-MSA.[678]

356. In the Notice, we observed that the monitoring data indicated that service quality under price caps was largely comparable to the levels achieved under rate-of-return regulation, although there were some possible problems.[679] We requested comment on whether the Commission should increase or revise the monitoring of the LECs' network reliability, service quality and infrastructure development. We also solicited comment on whether, and if so how, the Commission should expand its service quality monitoring to include price cap LEC facilities and services that may be interconnected with the local exchange network or used to provide similar capabilities, including wireless services and coaxial cable.[680]

**2. Comments**

357. MCI and Ad Hoc state that continued service quality monitoring is important, but recommend no changes to the current procedure.[681] Sprint, NYNEX and RTC state that the Commission's current monitoring system is adequate and that no additional reporting requirements are warranted.[682]

358. USTA and several of the LECs assert that, as markets become more competitive, competitive pressures will force the LECS to maintain high service quality and the need for service quality monitoring will diminish. They suggest that reporting requirements should be relaxed after markets have become more

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(Parts 31, 43, 67 and 69 of the FCC's Rules), CC Docket No. 86-182, Report and Order, 2 FCC Rcd 5770 (1987), modified on recon., 3 FCC Rcd 6375 (1988).

[677] Modified Service Quality Order, 8 FCC Rcd 7259, Attachment, FCC Report 43-07.

[678] Id.

[679] Notice, 9 FCC Rcd at 1691.

[680] Notice, 9 FCC Rcd at 1700-01.

[681] MCI Comments at 50-51; Ad Hoc Comments at 27-28.

[682] Sprint Comments at 20; NYNEX Comments at 56; RTC Comments at 22-23.

competitive.[683] A number of LECs express the concern that they would be disadvantaged by unequal reporting requirements in a competitive environment and argue that reporting requirements should be the same for all competitors.[684]

359. TCA notes that, although a survey of its members suggests that overall levels of service quality have not suffered under price cap regulation, many of its members reported disparities in service quality and availability among geographic locations. It suggests that the Commission should enhance its service quality monitoring program by requiring identification of poorly performing wire centers and underserved areas, and by collecting information on data transmission quality.[685]

360. USTA and several LECs argue that any benefits associated with TCA's recommendation would be outweighed by the additional costs and burdens that would result from increased reporting requirements.[686] USTA argues that the facts do not support TCA's claim that rural areas are falling behind urban areas in service quality. For example, USTA notes that, on an overall basis, non-MSA areas have a higher percentage of lines served by digital switches than MSA areas.[687] The parties opposing TCA's suggestion note that the Commission has previously rejected similar proposals by TCA,[688] and that it would impose significant burdens on both price cap LECs and the Commission.[689]

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[683] USTA Comments at 92-93; BellSouth Comments at 59; US West Comments at 50; SWB Comments at 63; Ameritech Comments at 20. See also SNET Comments at 4-5 (reporting requirements should be eliminated after a specified period of time); Lincoln Comments at 14 (service quality reporting requirements should be eliminated).

[684] Ameritech Comments at 20; BellSouth Comments at 59; US West Comments at 50; Pac Bell Comments at 57; GTE Comments at 79.

[685] TCA Comments at i-iii, 1-11.

[686] USTA Reply at 68-71; NYNEX Reply at 62-65; Pac Bell Reply at 55-59; US West Reply at 37-41; SWB Reply at 75-79.

[687] USTA Reply at 70-71.

[688] USTA Reply at 68-69, citing Policy and Rules Concerning Rates for Dominant Carriers, Memorandum Opinion and Order, 8 FCC Rcd 7474, 7476 (Service Quality Modifications Order)(1993); NYNEX Reply at 62-63; Pac Bell Reply at 55-56; US West Reply at 40; SWB Reply at 76.

[689] USTA Reply at 69-70.

361. Pac Bell states that infrastructure monitoring of carrier networks could be expanded to include additional items as new technologies are deployed. For example, Pac Bell suggests that Table I of the Infrastructure Report for Switching Equipment could be expanded to include the number of local switches equipped with Advanced Intelligent Network capabilities, Synchronous Optical Network interfaces and the number of lines served by those switches.[690] US West asserts that Pac Bell's proposed modifications are burdensome and redundant. As an example, it states that Pac Bell's proposed expansion of Table II, ARMIS 43-07, appears to duplicate data contained in the Commission's comprehensive report on fiber deployment.[691]

362. ICA supports proposals to improve the reporting procedures for service outages.[692] It recommends that, in order to make most efficient use of the Commission's resources, service quality, network reliability and associated reporting requirements should be addressed outside of price caps and should be dealt with in the proceedings specially focused on those issues.[693]

363. None of the commenting parties recommends that the Commission should expand its service quality monitoring to include new facilities and services, such as wireless and coaxial cable, that a price cap LEC may interconnect with its local interexchange network or introduce as a separate, new service.[694]

364. Pac Bell recommends that service quality reporting of telephone service be kept separate from other services, such as broadband. It notes that video services are not as critical to the customer as basic telephone service and that a LEC would not control all of the elements of a video product offering.[695]

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[690] Pac Bell Comments at 56-57.

[691] US West Reply at 37-38.

[692] ICA Comments at 18, citing Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions, Notice of Proposed Rulemaking, 8 FCC Rcd 8517.

[693] ICA Comments at 18-19.

[694] See NYNEX Comments at 59; Ameritech Comments at 21; MCI Comments at 52.

[695] See Pac Bell Comments at 58-59 (specifying differences in service quality parameters as between broadband service and basic telephony).

### 3. Analysis

365. There is nothing in the record to indicate that there has been any significant degradation of service quality since the institution of price cap regulation for LECs. Likewise, the record does not demonstrate that price cap regulation has created a disincentive for investment in the nation's telecommunications network. The service quality and infrastructure monitoring systems may nonetheless need updating and improving to keep pace with the introduction of new technologies and services and the development of competition. We recognize that, when the Bureau declined to adopt TCA's disaggregation proposals in the Service Quality Modifications Order, it indicated that the issue might be revisited in this proceeding.[696] That issue is, however, still before the Commission on application for review, and other service quality and infrastructure reporting matters are also pending before us.[697] We will, therefore, adopt ICA's suggestion and defer any changes to the service quality and infrastructure monitoring programs to the separate proceedings that are specially focused on those issues.

366. None of the commenting parties addressed network reliability issues. Since the Notice was issued, the Commission has dealt with those issues in a separate proceeding.[698]

## G. Other

367. The Common Carrier Bureau recently rescheduled the

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[696] Service Quality Modifications Order, 8 FCC Rcd at 7476.

[697] See Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd 2974 (Com. Car. Bur. 1991) (Service Quality Order), recon., 6 FCC Rcd 7482 (Com. Car. Bur. 1991); Service Quality Modifications Order, 8 FCC Rcd 7474; TCA Application for Review, filed June 17, 1991; International Communications Association ("ICA") and Consumer Federation of America ("CFA") Joint Petition for Rulemaking, filed April 6, 1992; Petitions for Reconsideration of the Common Carrier Bureau's Service Quality Modifications Order filed on November 12, 1993 by the following parties: Ameritech, Bell Atlantic, Pacific Bell and Nevada Bell, Southern New England Telephone Company, Southwestern Bell Telephone Company, United States Telephone Association, and US WEST; US WEST Petition for Limited Waiver of the Commission's ARMIS service quality and infrastructure reporting requirements, filed November 12, 1993.

[698] Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions, CC Docket No. 91-273, Second Report and Order, 9 FCC Rcd 3911 (1994) (Service Disruption Order).

filing date for the price cap LECs' 1995 annual access filings from March 31, 1995, to 30 days after the release date of this Order. The effective date of the price cap LECs' annual access tariffs was also rescheduled from July 1, 1995, to August 1, 1995.[699] As a result, the 1994-95 tariff period for these carriers will be composed of 13 months, and the 1995-96 tariff period for these carriers will include only 11 months. We hereby direct the price cap LECs to make appropriate adjustments to their indexes, to account for these effects caused by rescheduling their 1995 annual access filings. We delegate authority to the Chief of the Common Carrier Bureau for this purpose. The Bureau's Order also should specify the pleading cycle for the tariff filings and what adjustments, if any, are needed for the tariff filing of the National Exchange Carrier Association (NECA) regarding common line costs.[700]

## VI. TRANSITION ISSUES

### A. Overview

368. This Commission has a long history of fostering the development of competition in telecommunications markets. Partly as a result of the Commission's actions, competition today is a fact in both the customer premises equipment and the long distance market. As we move forward, it is our goal to encourage the development of efficient competition in local telephone markets, as well. While local access competition has begun to develop, the LECs continue to exercise a substantial degree of market power in virtually every part of the country, and continue to control bottleneck facilities.[701] We believe that a competitive local market will produce public interest benefits for consumers in the form of lower prices, better service, and a choice of service providers.

369. In the Notice, we designated several issues as "Transition Issues." We intended the comments submitted in response to these issues to develop data and information relevant to fashioning a workable plan for revising the price cap plan in

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[699] 1995 Annual Access Tariffs, United States Telephone Association, Application for Waiver, DA 95-494 (Com.Car.Bur., released Mar. 16, 1995).

[700] Id. at paras. 6, 11.

[701] See generally Time Comments at 3, 9-11; TCG Comments at 3, 16-19; AT&T Comments at i, 8-9; MFS Comments at 37; API Reply at 5; CCTA Reply at 31-33; ALTS Comments at 2; ALTS Reply at 2; Comptel Comments at i, 4; Ad Hoc Comments at 33; MCI Comments at 65; MFS Comments at 52-53; Hyperion Reply at 1; Wiltel Reply at 8; OCCO Comments at 12.

the future as competition develops.[702] In this section we discuss four categories of transition issues: (1) how to reduce or streamline regulation of price cap LECs as competition develops, and how to determine whether competition has reached a level that might warrant streamlined regulation; (2) whether and how to revise the composition of service baskets; (3) whether and how flexibility within the baskets and bands could be increased; and (4) whether the new services rules should be modified. In the Notice, we sought comment on the new service requirements as a baseline issue.[703] Because some commenters addressed the new services issue in connection with the development of competition, we consider the issue here in this section.

370. One of the transition issues specified in the Notice, how frequently to conduct price cap performance reviews, has been addressed in part by our tentative decision to adopt an X-Factor mechanism based on a moving average. Because a moving average X-Factor would be readjusted automatically to account for future increases in LEC productivity, the need for periodic performance reviews would be greatly reduced. Thus, in our analysis of the X-Factor, we have already begun to explore ways to adapt price cap regulation to competition that is likely to develop in the future. As a result, we will not address this issue further in this section. We will raise the issue of periodic review again in the Further Notice of Proposed Rulemaking, however, particularly for other aspects of the price cap plan. In addition, we solicited comments on whether to revise service quality and infrastructure monitoring as part of a transition price cap plan.[704] We have addressed this issue together with our analysis of existing service quality and infrastructure monitoring in Section V.F.[705] Therefore, we will not address this issue further in this section.

**B. Background and Comments**

**1. Reducing or Streamlining Regulation of LEC Services**

371. In the Notice, we stated that, if a LEC no longer controls essential "bottleneck" facilities, then that LEC may no longer possess market power, and it might no longer be necessary

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[702] Notice, 9 FCC Rcd at 1705.

[703] Notice, 9 FCC Rcd at 1701-03.

[704] Notice, 9 FCC Rcd at 1706.

[705] See Section V.F. of this Order, supra; see also Service Quality Modifications Order, 8 FCC Rcd at 7476.

to maintain regulations that protect against abuse by a monopoly.[706] Therefore, we asked for comment on a number of issues in this area, including the current state of competition for local exchange and interstate access, and what criteria should be used for determining whether reduced or streamlined regulation should take effect. We also asked under what circumstances will a LEC no longer have control over "bottleneck" facilities, to what extent CAPs or others have the ability to compete with LECs, and what effect LEC entry into related industries, and BOC entry into interLATA marketplaces, should have on the LEC price cap plan. Finally, we solicited comment on regulatory methods for reducing or streamlining price cap regulation.[707]

372. USTA contends that access competition already exists in many markets and will increase rapidly in the near term.[708] USTA recommends creating a three-tier market structure consisting of Initial Market Areas (IMAs), Transitional Market Areas (TMAs), and Competitive Market Areas (CMAs). Increasing pricing flexibility would be allowed as a market area is reclassified from IMA to TMA, and from TMA to CMA, based on the level of effective competition within the area.[709]

373. Under USTA's proposal, each of a LEC's current study areas or pricing zones would be classified as an IMA.[710] A wire center or group of wire centers within an IMA could be reclassified as a TMA when another entity offers substitutable access services within the area served by the wire center or when an operational expanded interconnection arrangement within the wire center becomes available.[711] TMAs, or parts thereof, could be reclassified as CMAs as each wire center satisfies additional criteria demonstrating increased competition. A TMA could be reclassified as a CMA if, e.g., customers within the serving area of the wire center representing at least 25 percent of the demand for the LEC's interstate access services (1) have available to them an alternative source of supply; and (2) solicit bids to reduce the cost of their access services.[712] Services in a CMA

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706 Notice, 9 FCC Rcd at 1705.

707 Id.

708 USTA Comments at 24, 39.

709 USTA Comments at 58.

710 USTA Comments at 59.

711 USTA Comments at 64-65.

712 USTA Comments at 33-39, 62-65.

would be removed from price cap regulation.[713]

374. MCI avers that the Commission recently rejected a USTA plan similar to USTA's three-tiered market structure proposal in this proceeding and that nothing has changed since that decision that would support a change of course now.[714]

375. In response to USTA's January 18 proposal, NYNEX recommends that the Commission establish a series of sharing bands that would link the elimination of sharing requirements with local exchange competition.[715] In a subsequent ex parte filing, NYNEX proposes a three-stage plan that would relax sharing requirements for LECs that have implemented measures to promote local exchange competition (e.g., unbundled local loop offerings).[716]

376. Bell Atlantic and Ameritech state that their interstate intraLATA toll and corridor interexchange services face intense competition and should be removed from price cap regulation.[717] Bell Atlantic and SNET state that their high capacity (DS1 and DS3) access services and video dialtone services face intense competition and should be removed from price caps.[718]

377. MFS recommends that, once the bottlenecks are opened

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[713] USTA Comments at 69-70; see also GTE Comments at 47-58 (supporting USTA's three-tier market proposal); id. at 47 (stating that "the main focus of the Commission's access market definition should be geographic in nature, and that the unit of observation chosen should be the smallest practical geographic area").

[714] MCI Reply at 22, citing Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369 (1992), 7 FCC Rcd 7374, 7426-28 (1993); id. (stating that as recently as May 27, 1994, the Commission stated that there is no present need to expand the scope of LEC pricing flexibility, because to do so would threaten emerging competition) (citing Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd 2718 (1994)).

[715] NYNEX January 18 Comments at 5.

[716] NYNEX March 3 Proposal at 4.

[717] Bell Atlantic Comments at 19-20; Ameritech Comments at 29-30.

[718] Bell Atlantic Comments at 1-3, Affidavit of Richard E. Beville at 15; SNET Comments at 13.

on a nondiscriminatory basis to competitors, greater pricing flexibility be allowed based on a showing by the LEC that competitive services are actually available on a widespread basis throughout the geographic area.[719] TCG maintains that the Commission should consider additional flexible regulation of LECs when competition reaches the levels that AT&T experienced when the Commission deregulated AT&T's services.[720]

378. Sprint proposes that the Commission adopt a 3.3, a 3.9, and a 4.5 percent X-Factor.[721] LECs choosing the 4.5 percent X-Factor would qualify for more streamlined regulation and greater pricing flexibility, including immediate implementation of zone density pricing.[722]

### 2. Revising Baskets

379. When we created the price cap baskets for LECs, each with separate price cap indexes and bands, we balanced two competing concerns. First, we limited the number of baskets to ensure that the company-wide productivity offset would be appropriate for each basket. Second, because we wanted to preclude LECs from disadvantaging customers for one service with higher prices so that it could lower prices charged to another service class, we based the baskets on existing access categories.[723] In addition, we grouped similar services into service categories within some baskets, to limit the LECs' ability to shift costs between services in a potentially

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[719] Specifically, MFS would require the price cap LEC to show that 50 percent of customers have competitive services available and that 15 percent actually use those services. MFS Comments at 44. MFS's suggested standard is similar to the definition of "effective competition" incorporated in the Cable Act of 1992. Section 623(l)(1) of the Communications Act, 47 U.S.C. § 623(l)(1).

[720] TCG Comments at 11.

[721] Sprint Dec. 29, 1994 Ex Parte Proposal; Sprint Feb. 2, 1995 Ex Parte Proposal.

[722] Sprint Dec. 29, 1994 Ex Parte Proposal; see also id. (for LECs electing the 4.5 percent X-Factor, 1.7 percent would be "targeted to transport RIC phasedown, .8 percent effected through adoption of the per line cap for the [carrier common line charge], and a 2 percent productivity offset applicable to all baskets").

[723] LEC Price Cap Order, 5 FCC Rcd at 6812.

anticompetitive manner.[724] We have made some revisions to the price cap baskets during the first four years of the plan.[725] Currently, the common line and interexchange baskets have no service categories.[726] The traffic sensitive switched basket contains separate service categories for local switching, information, database access, and billing name and address (BNA).[727] The trunking basket currently contains separate service categories for (i) voice grade entrance facilities; (ii) audio and video services; (iii) high capacity special access services, with subcategories for DS1 and DS3 services; (iv) wideband data and wideband analog services; (v) tandem-switched transport; (vi) interconnection charges; and (vii) signalling for tandem switching.[728] In the Notice, we stated that it might be necessary to revise the price cap baskets to group services with similar levels of competition together. We solicited comment on whether and how the Commission should schedule revisions to baskets as competition develops.[729]

380. USTA proposes that four baskets be established within the price cap plan: transport,[730] switching,[731] "Public

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[724] LEC Price Cap Order, 5 FCC Rcd at 6811.

[725] See Transport Rate Structure and Pricing, CC Docket No. 91-213, Second Report and Order, 9 FCC Rcd 615 (1994) (Second Transport Order); see also Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006 (1992) (Transport Order); 8 FCC Rcd 5370 (1993) (First Transport Reconsideration Order); 8 FCC Rcd 6233 (1993) (Second Transport Reconsideration Order); Provision of Access for 800 Service, CC Docket No. 86-10, 8 FCC Rcd 907 (1993); Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (BNA Order), recon. 8 FCC Rcd 6393 (1993); further recon. 8 FCC Rcd 8978 (1993), recon. pending.

[726] Section 61.42(d) of the Commission's Rules, 47 C.F.R. § 61.42(d).

[727] Section 61.42(e)(1) of the Commission's Rules, 47 C.F.R. § 61.42(e)(1).

[728] Section 61.42(e)(2) of the Commission's Rules, 47 C.F.R. § 61.42(e)(2).

[729] Notice, 9 FCC Rcd at 1705-06.

[730] The Transport basket would include all interoffice transport, all facilities provided under interstate access tariffs between the local serving office and a customer's

Policy,"[732] and "Other," to include any rate elements that did not fit into the other baskets.[733] Within a basket, USTA would establish separate market area categories corresponding to the maximum number of IMAs established in any study area or zone. One TMA market area category would be established for all TMA elements within the Transport, Switching and Other baskets. IMA and TMA category designations would not apply to the Public Policy basket.[734]

381. Although many of the LECs support USTA's proposal for restructuring the current price cap basket structure,[735] some of the LECs make their own recommendations for revising the basket and band structure to increase pricing flexibility.[736] For

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premises, any features associated with transport, and the interconnection charge. USTA Comments at 67.

[731] The switching basket would include all current and new switching functions, as well as features associated with switching. USTA Comments at 68.

[732] The Public Policy basket would include Lifeline Assistance, Universal Service Fund, End-User Common Line Charge, Carrier Common Line Charge (or a substitute recovery mechanism), Long-Term Support, Interconnection Charge, Telecommunications Relay Service, Special Access Surcharge, and any other elements established by the Commission for explicit interstate public policy purposes. USTA Comments at 68.

[733] USTA Comments at 68; see also January 18 Letter, Attachment 2 at 3.

[734] USTA Comments at 68.

[735] USTA Comments at 66-72; SWB Comments at 86; Lincoln Comments at 13; RTC Comments at 13-14; NYNEX Comments at 25; see generally SNET Comments at 11.

[736] See US West Comments at 30, 88-89; id. at 31 n.66 (US West supports USTA's proposal, but believes it is overly conservative in restricting the downward pricing flexibility in IMA and TMA sub-indexes); see generally Pac Bell Comments at 102 (although Pac Bell supports USTA's proposal, Pac Bell believes that ultimately there should be only two baskets: one basket for services subject to explicit and implicit subsidies, and another for services that are subject to high elasticities of supply and demand, but are not fully competitive); NYNEX Comments at 26-27 (as an alternative to USTA's proposal, recommends reducing the categories in the Trunking basket to two: one for analog and another for digital). NYNEX also asserts that Billing Name and Address (BNA) is a billing and collection service, and that it

example, BellSouth recommends renaming the interexchange basket "Other," and expanding it to include all new services that "cannot be appropriately assigned to the [other three baskets.]"[737] BellSouth also proposes reducing the service categories in the Trunking basket to three: Tandem-switched Transport and Interconnection, which would be subdivided into two subcategories: High Capacity services (including DDS) and "Other."[738] BellSouth recommends similar streamlining of the service categories in the Traffic Sensitive basket.[739]

382. MCI, Ad Hoc, ICA, and TCG contend that the basket and band rules should not be revised at this time and assert that the current composition of baskets gives the LECs adequate pricing flexibility to respond to any emerging competition.[740] MCI asserts that USTA's proposal to reduce the number of service categories would provide the LECs with unwarranted pricing flexibility.[741] MCI also notes that the Commission recently declined to move transport switching into the switching basket because it would allow LECs to mix non-competitive local switching with potentially competitive tandem switching.[742]

### 3. Service Category Band Flexibility

383. Each price cap basket is subject to an aggregate price cap or ceiling. A presumption of lawfulness and relatively short tariff filing notice periods apply to rate changes that do not result in the aggregate rates for each basket exceeding the price

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should be removed from price cap regulation. NYNEX Comments at 26-27. We have determined previously that BNA is not a billing and collection service, and we will not revisit that issue at this time. See BNA Order, 8 FCC Rcd at 4480-82.

[737] BellSouth Comments at 25.

[738] Id.

[739] Id.

[740] Ad Hoc Comments at 18; TCG Comments at 11; MCI Comments at 16; ICA Reply at 11.

[741] MCI Reply at 22.

[742] MCI Reply at 23, citing Second Transport Order, 9 FCC Rcd 615. MCI also contends that there are a number of petitions pending before the Commission to revise the access charge rate structure, and asserts that it would be premature for the Commission to modify the price cap structure prior to a resolution of the LEC access service structure. MCI Comments at 18 n.22.

cap. Within two of the baskets (traffic sensitive and trunking), specific LEC services are grouped into narrower service categories and subcategories, each of which is subject to upper and lower pricing bands (i.e., aggregate price ceilings and floors). The upper and lower bands for most of the service categories and subcategories are +/- 5 percent relative to the price cap index for the basket.[743] As with the baskets, the presumption of lawfulness and relatively short tariff filing notice periods apply to rate changes as long as the aggregate rates for each service category and subcategory remain between the upper and lower pricing bands. Substantial cost justification and longer tariff filing notice periods are required if rates exceed the price cap for a basket or fall above or below the applicable pricing bands for a service category or subcategory.

384. We adopted the service category lower bands as a check against predatory pricing. LECs filing tariffs with rates below the applicable lower bands for a service category must demonstrate that their revised rates are above average variable costs. We also intended to limit the LECs' ability to offset rate reductions in some categories with rate increases in other categories. In the Notice, we invited interested parties to discuss whether and how we should adopt changes in these rules and policies as part of a LEC price cap transition plan.[744]

385. Under USTA's proposal, individual IMA and TMA categories would be subject to an upper pricing band of 5 percent per year, and lower pricing bands of 10 percent and 15 percent, respectively.[745] Also, USTA recommends shorter notice periods and streamlined cost support requirements based on the level of effective competition within the area.[746]

386. In its January 18 ex parte statement, USTA advocates

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[743] Certain service categories have narrower upper bands and/or broader lower bands. Specifically, the tandem switched transport service category has a +2 percent upper band and a -5 percent lower band; the transport interconnection charge service category has a +0 percent upper band and no lower band; and the signalling for tandem switching service category has a +2 percent upper band and no lower band.

[744] Notice, 9 FCC Rcd at 1706.

[745] USTA Comments at 69.

[746] USTA Comments at 77-78; see also NYNEX Comments at 19 and 20 n.50 (although NYNEX supports USTA's proposal, it recommends significantly greater flexibility for many services offered in TMAs and IMAs).

eliminating the DS1 and DS3 subindexes, expanding the lower banding limits to minus 15 percent, and extending zone pricing to the local switching category as well as to all elements in the trunking category except the interconnection charge.[747]

387. NYNEX and Ameritech suggest that, if banding is retained for all Trunking services, each service category and zone should be subject to an upper pricing band of 5 percent and a lower pricing band of at least 15 percent to allow downward flexibility in competitive zones and for digital services.[748] In addition, NYNEX recommends that the banding limits on local switching, directory and database should be modified to permit rate decreases of up to 10 percent without cost support.[749] Ameritech recommends that the Commission establish zone density pricing for local switching with an upper pricing band of 5 percent and a lower pricing band of 15 percent.[750]

388. BellSouth recommends increasing the downward pricing flexibility based on its proposed basket restructure, discussed above. BellSouth would place an upper and lower banding limit of 5 percent on the Dedicated Service Transport category; a 15 percent lower pricing limit for the High Capacity and "Other" subcategories of the Transport services category and for the Information and Database categories; and a 10 percent lower pricing limit for zone pricing in the trunking basket. In addition, BellSouth proposes extending zone pricing to the switched service category, with upper and lower pricing limits identical to those in the trunking basket.[751] MCI replies that there have been no changes in the marketplace since the adoption of zone pricing and the recent restructure of the bands and baskets to warrant adoption of BellSouth's proposal for modifying the LEC price cap basket and band structure.[752]

389. WilTel and MFS assert that the current price cap baskets and bands do not constrain the LECs' ability to offset price decreases for more competitive services with price increases for less competitive services, thus allowing LECs to implement unreasonably discriminatory rate relationships. WilTel recommends that the Commission "address discrimination in rate

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747 January 18 Letter, Attachment 2 at 2.

748 NYNEX Comments at 26-27; Ameritech Reply at 10-11.

749 NYNEX Comments at 26-27.

750 Ameritech Reply at 10-11.

751 BellSouth Comments at 25-31.

752 MCI Reply at 23-24.

relationships by adopting cost-based pricing principles . . . ."[753] MFS recommends that the Commission require rates in the trunking basket to be set equal to incremental costs, plus an allocation of overhead costs that would be based on the same loading factor for all rate elements in the trunking basket.[754]

390. The LECs make several arguments to rebut WilTel's and MFS's claims: 1) there is no discrimination because different prices are not being charged to similarly situated customers for like services; 2) a fully allocated cost approach to rate setting is inconsistent with price cap regulation;[755] and 3) MFS's cost consistency proposal would constitute a reversion to rate-of-return regulation, ignores market demand information, and would be an enormous administrative burden.[756]

391. Comptel claims that tandem-switched transport service should be in the switching basket, because tandem and local switching functions generally are performed by the same switch, and that tandem-switched rates should be based on DS1 and DS3 rates.[757] Comptel maintains that, because tandem switching is now in the trunking basket, the LECs are able to allocate excessive overhead amounts to tandem switching. Comptel maintains that this distorts interexchange competition, because tandem switching is used predominantly by smaller IXCs.[758]

392. In response to Comptel's arguments and proposal, Pac

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[753] WilTel Comments at 18-23; see also id. at 22 (WilTel suggests that the Commission "could conduct cost studies in an effort to reset the starting point for rates for all price cap services"); Comptel Comments at 9-14 (claiming that an excessive proportion of overhead costs are recovered through DS1 rates relative to DS3 rates).

[754] MFS Comments at 15-21. Alternatively, MFS recommends adoption of rate-element banding in the trunking basket under which no individual rate element could be increased or decreased by more than 5 percent annually relative to the PCI, except for those elements with special pricing rules such as the interconnections charge. Id. at 20 n.17.

[755] BellSouth Reply at 11-14; Pac Bell Reply at 41 (asserting that the Commission is not required to mandate the allocations that WilTel proposes).

[756] NYNEX Reply at 16; Pac Bell Reply at 53; SWB Reply at 73.

[757] Comptel Comments at 11.

[758] Comptel Comments at 11-15.

Bell says that tandem switching rates do not subsidize local switching rates but, rather, as a result of the Commission's decision in CC Docket No. 91-213, usage-based transport rates subsidize tandem switching rates.[759] Pac Bell notes that the Commission observed that "a ban on discounts would disadvantage the LECs without providing small IXCs the benefits they seek to achieve."[760] Pac Bell asserts that the Commission has already decided against requiring rate relationships between DS1 and DS3.[761]

**4. New Services**

393. The LEC Price Cap Order defines new services as services that add to the range of options already available to customers. A new service may, but need not, include a new technology or functional capability.[762] New services are not included under the price cap indexes until the first annual price cap tariff filing after the completion of the base year in which the new service becomes effective.[763]

394. Under our current rules, tariff filings proposing new services that will be subject to LEC price caps must be made on at least 45 days' notice[764] and be accompanied by "detailed cost support[.]"[765] Specifically, a LEC introducing a new service is required to show that it has used a consistent costing methodology for direct costs "for all related services."[766] Cost

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[759] Pac Bell Reply at 33-34.

[760] Pac Bell Reply at 35, quoting Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 8 FCC Rcd 7374, 7434 (1993).

[761] Pac Bell Reply at 37, citing Second Transport Order, 9 FCC Rcd at 623.

[762] LEC Price Cap Order, 5 FCC Rcd at 6824.

[763] LEC Price Cap Order, 5 FCC Rcd at 6824.

[764] Id. at 6825.

[765] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524, 4524 (1991) (Part 69 ONA Order); modified on recon., 7 FCC Rcd 5235 (1992) (Second Further Reconsideration); further recon. denied, FCC 94-348 (released Dec. 29, 1994) (Third Further Reconsideration).

[766] Part 69 ONA Order, 6 FCC Rcd at 4531.

support accompanying a LEC new service tariff filing must include, in part, a study containing a projection of costs for a representative 12-month period and estimates of the effect of the new service on traffic and revenues, including the traffic and revenues of other services.[767] As part of the justification for the price selected for the new service, LECs may include "risk premium" on investments in unusually risky new services.[768]

395. To derive the overall price of the new service, LECs add a "reasonable" level of overhead costs.[769] LECs may load overhead on new services in a non-uniform manner, provided that LECs justify the deviations from uniform loadings.[770] Where a LEC develops a lower cost version of an existing service, pricing the service so that the LEC breaks even would be an acceptable justification for non-uniform loadings.[771] Further, non-uniform overhead loadings are presumptively reasonable whenever a LEC uses them to justify the introduction of a new service at a level below the imputed "old" price of a substitutable service.[772]

396. In light of our concern that the LECs may understate the direct costs of video dialtone service in order to set unreasonably low prices and engage in cross-subsidization, we provided in the Video Dialtone Order more specific guidance regarding the identification of direct costs in video dialtone new service tariff filings than we have given for other new services filings.[773] In particular, LECs are required to include in direct costs a reasonable allocation of common costs associated with shared plant used to provide video dialtone and

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[767] Part 69 ONA Order, 6 FCC Rcd at 4531.

[768] Part 69 ONA Order, 6 FCC Rcd at 4531; see also Second Further Reconsideration, 7 FCC Rcd at 5237 (a risk premium is "defined as the additional rate of return a LEC needs to justify the development of a particularly risky new service").

[769] Part 69 ONA Order, 6 FCC Rcd at 4531.

[770] Part 69 ONA Order, 6 FCC Rcd at 4531.

[771] Second Further Reconsideration, 7 FCC Rcd at 5236; Third Further Reconsideration at para. 5.

[772] Second Further Reconsideration, 7 FCC Rcd at 5237; Third Further Reconsideration at para. 5.

[773] Telephone Company-Cable Television Cross Ownership Rules, Section 63.54-63.58, CC Docket No. 87-266, and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, RM-8221, 10 FCC Rcd 244, 344-46 (1994) (Video Dialtone Order).

other services. LECs allocating an extremely low percentage of common costs of shared plant to video dialtone must provide a strong justification for doing so. In addition, LECs are required to provide a strong justification for allocation of extremely low overheads to video dialtone service.[774]

397. In our Notice, we asked whether the LEC price cap new services requirements impose unnecessary regulatory impediments to the development and introduction of new services and, if so, how we should modify the LEC price cap new services procedures and cost support rules to ensure that these rules advance our goals of encouraging innovation and setting reasonable rates. We also asked whether new services are available on an equal basis to all LEC customers and whether we should revise the LEC price cap plan to ensure the universal availability of new services.

398. USTA and the LECs contend that the LEC price cap new services rules, the Part 69 rate structure requirements, and the constraints on pricing flexibility impede the development and introduction of new services.[775] Some of these commenters claim that the new services rules require an unnecessarily long notice period, as well as complex and detailed cost support.[776] They maintain that many new services do not readily fit the Part 69 rate structure requirements and that the process for obtaining a waiver or changing the rules for new switched access services is costly, time-consuming, and highly uncertain.[777]

399. USTA and some of the LECs propose that the Commission revise the Part 69 rules to codify only those elements that are necessary to implement a specific public policy program

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[774] Id. at 345-46.

[775] USTA Comments at 52; Ameritech Comments at 8; GTE Comments at 10, 18; SWB Comments at 78-80; US West Comments at 52; SNET Comments at 3; Lincoln Comments at 13; Ameritech Comments at 21-22; BellSouth Comments at 60-61; NYNEX Comments at 41; Pac Bell Comments at 64; Bell Atlantic Comments at 28; see also ICA Comments at 19-20; US West at 54 (stating that the Part 61 prohibition on references to technical publications in tariffs impedes the introduction of new services; Section 61.74 of the Commission's Rules should be modified to permit LECs to reference technical publications in their interstate tariffs).

[776] US West Comments at 52, 57; USTA Comments at 23; GTE Comments at 10; SWB Comments at 80; NYNEX Comments at 42; SNET Comments at 3; Ameritech Comments at 23.

[777] USTA Comments at 52-53; US West Comments at 52; SWB Comments at 73; Pac Bell Comments at 64; SNET Comments at 3; GTE Comments at 10-12.

established by the Commission.[778] Moreover, USTA's three-tier market structure proposal, discussed above, would require the Commission to revise the new services rules by adopting a regulatory mechanism which allows for streamlined cost support requirements and shorter notice periods based on the degree of competition in a particular market area.

400. In its January 18 Letter, USTA urges the Commission to eliminate the Part 69 waiver requirements for the introduction of new rate elements, to reduce the tariff review period to 21 days for new services whose projected revenues satisfy a de minimis test, and to require new services to be supported only by an incremental cost showing.[779]

401. Bell Atlantic recommends that the Commission remove new services from price cap regulation. Bell Atlantic asserts that most new services are "discretionary" services in that they are not essential to consumers or competitors. Bell Atlantic asserts that consumers can elect not to buy new services, and competitive entry will occur, if prices for such services are set too high.[780]

402. BellSouth recommends that if a LEC establishes that the proposed price for a new service filing equals or exceeds long run incremental cost, the rate should be presumed valid at the conclusion of a 30-day notice period. BellSouth asserts that an upper pricing limit is unnecessary for new services because customers will not subscribe to new services that are priced too high. As an exception to this rule, BellSouth recommends that tariff filings for services mandated by the Commission pursuant to a rulemaking should be supported not only by a long run incremental cost showing, but also by a showing that the proposed rates are just and reasonable.[781]

403. MCI asserts that the upper limit on new service prices must be retained because the LECs' extensive market power would enable them to abuse additional pricing flexibility. MCI contends that the lower limit on new service prices also must be

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[778] USTA Comments at 18, 72-77; SWB Comments at 79-81; RTC Comments at 15; Pac Bell Comments at 64; GTE Reply at 62-68.

[779] January 18 Letter, Attachment 2 at 2-3.

[780] Bell Atlantic Comments at 24-26; Bell Atlantic January 18 Comments at 5-6; accord Ameritech Comments at 21-26.

[781] BellSouth Comments at 62-65; BellSouth Reply at 35; see also NYNEX Comments at 44-46 and NYNEX Reply at 25 (recommending a dual approach for new services that is similar to BellSouth's proposal and for similar reasons).

retained to guard against predatory pricing and to ensure that the new services are not being subsidized by existing services. MCI opposes the Commission's suggestion in the Notice that new services should receive less scrutiny when they are first introduced because "[t]his would give the LECs too much initial flexibility and increase the administrative costs of reviewing the services."[782]

404. MFS, WilTel, and ICA recommend that the new services test be revised to prevent the LECs from establishing discriminatory or otherwise unreasonable rates.[783] To this end, MFS recommends that the LECs be required to incorporate new services into their price cap index calculations immediately upon becoming effective. Also, MFS recommends that new services that will be placed in the trunking basket (as well as existing services in the trunking basket) should be subject to a "cost consistency test." The cost consistency test would allow LECs to increase or decrease rates for individual rate elements as long as the price-to-cost ratio for each rate element remained within 10 percent of the average ratio for the trunking basket.[784] In a similar vein, WilTel recommends that the Commission adopt a "price indexing" approach to evaluating the prices for new (and existing) services, which would allow LECs to change prices for the more competitive services, but only if the LEC adjusted prices for the less competitive prices in a parallel manner.[785] ICA recommends that the Commission adopt a "price linking" approach to new services whereby the LECs would be required to calculate a second, "surrogate" actual price index for each basket. The surrogate API would reflect the embedded services in the basket and all new services based upon three years forecasted demand. The LECs would be required to reduce the PCI for the basket by the difference between the actual API and the surrogate API for the basket when the differential exceeded two percentage

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[782] MCI Comments at 56; see also ICA Comments at 20; MFS Comments at 28.

[783] WilTel Comments at 21-25; MFS Comments at 25-26; ICA Comments, Attachment B at 1. WilTel, MFS and Sprint contend that the plethora of new service offerings over the past three years belie arguments that the LECs lack incentive to deploy new services. Id.; Sprint Comments at 2; see also TAG Comments at 11-12.

[784] MFS Comments at 16-17, 26. MFS's cost consistency test would replace the service categories and subindexes in the trunking basket. Id.

[785] See WilTel Comments at 27.

points.[786]

405. GTE maintains that WilTel's price indexing and ICA's price linking proposals would make it unattractive for the LECs to respond to demand or cost changes, and to competitive challenges.[787] USTA states that ICA's proposal to tie one set of prices (i.e., those for new services) to another set of prices (i.e., those for existing services) is inconsistent with a fundamental feature of price cap regulation -- to allow rates to be established independently of other rates, subject to basket and banding requirements.[788]

**C. Analysis**

406. As we proceed to refine the LEC price caps regulatory scheme, we intend that it will advance the goal of fostering an efficiently competitive local market. We are prepared to modify our regulatory framework if doing so would hasten the emergence of competition. As we have shown in the Interexchange Proceeding and the Performance Review Proceeding with respect to AT&T, we are willing to remove services from price caps and place them under streamlined regulation when the record indicates that the services are in fact subject to competition.[789] We have also demonstrated, in acting upon the Rochester Open Market Plan, our willingness to act on waiver petitions that seek relief from existing Part 61 and Part 69 rules in order to implement their proposals for promoting competition.[790]

407. The present record requires further development to permit us to identify when interstate access services are adequately competitive to trigger the streamlining that we believe is warranted when competition is present. The record also contains insufficient data concerning the competitiveness of specific markets upon which to base a decision to revise our price cap system. This Report and Order, therefore, focuses on

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[786] ICA Comments at 21 and Appendix B at 1.

[787] GTE Reply at 86-87; accord BellSouth Reply at 13.

[788] USTA Reply at 44.

[789] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991) (Interexchange Order); Second Report and Order, 8 FCC Rcd 3668 (1993); Revisions to Price Cap Rules for AT&T Corp., CC Docket No. 93-197, FCC No. 95-18 (released Jan. 12, 1995) (AT&T Performance Review Order).

[790] See Rochester Telephone Corp. Petition for Waivers to Implement its Open Market Plan, FCC 95-96 (released Mar. 7, 1995) (Rochester Telephone Corp. Order).

the baseline issues identified in the Notice. The further notice in this proceeding will solicit comment on transition issues related to anticipated changes in the market, technology, and regulation over the next few years. We will use the further notice to develop specific standards for evaluating the state of competition in particular markets. The analytical framework we applied to determine which of AT&T's services should be subject to streamlined regulation may prove applicable to comparable LEC services. Bell Atlantic and Ameritech, for example, claim that their interstate intraLATA toll and corridor interexchange services already compete with offerings from other carriers and should be removed from price caps. If the standards we applied to AT&T prove to be appropriate for assessing the validity of these claims and the record demonstrates that the LEC toll services satisfy those standards, we are prepared to convert those services to streamlined regulation. In addition, knowledgeable parties may advise us that other tools are more appropriate to evaluate the competitiveness of particular local markets. We applaud efforts by USTA,[791] NYNEX, Sprint and other parties that have submitted proposals for adapting price caps regulation to the emergence of competition. These parties recognize, however, the need for a more complete and detailed record regarding the standards for measuring competitiveness of markets.[792]

408. We conclude that the record does contain sufficient evidence to justify allowing the LECs greater flexibility to lower prices within service category bands. This will permit LECs and other carriers to implement rate reductions that will move their prices to more economically efficient levels.[793] We find that an expansion of lower-band pricing flexibility would be in the public interest. The further notice will investigate the conditions that might warrant further relaxation of the lower bands.

409. Parties have objected to the LECs' request for expanded authority to lower their prices on the grounds that such changes may increase the risk of predation, that any departure from fully distributed cost pricing amounts to unreasonable discrimination, and that LECs may abuse prematurely-granted downward pricing flexibility to foreclose competitive entry. We

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[791] See also GTE Comments passim (supporting USTA's proposal); GTE March 10, 1995 Ex Parte.

[792] NYNEX March 3 Proposal at 4.

[793] LEC Price Cap Order, 6 FCC Rcd at 6824. As in the LEC Price Cap Order, we do not believe the record supports streamlining of below-band tariff filings, and we will continue to "err on the side of caution." Id.

do not believe that a limited increase in downward pricing flexibility would significantly increase the risk of successful predation by the LECs. As we concluded in the LEC Price Cap Order, predatory pricing is fairly uncommon, proven cases are rare, and the establishment of price cap baskets "lessens the already unlikely occurrence of predation."[794] Moreover, the increased potential for access competition in light of our adoption of expanded interconnection for special access and switched transport[795] makes it more likely than it was at the time that we adopted the LEC Price Cap Order that price decreases are legitimate responses to competition rather than predatory pricing.

410. Further, we believe that any increased risk of such conduct is outweighed by the benefits that consumers will receive from lower prices. The Commission has other mechanisms, such as the continued requirement that below-band rate reductions be accompanied by cost support, and the formal complaint process pursuant to Section 208, to protect against predatory pricing. In reviewing the LEC price cap rules, the United States Court of Appeals for the District of Columbia Circuit held that "the statutory 'just and reasonable' rate requirement [does not] mandate[] use of fully distributed cost pricing."[796] Finally, we believe that granting the LECs greater downward pricing flexibility should promote, not hamper, the development of competition. Allowing LECs to set their prices at levels closer to economic cost will invite new entry by firms that are at least

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[794] Id. As discussed above, by grouping services facing similar levels of competition into baskets, we limit opportunities for LECs to engage in predatory pricing by shifting costs to some other less competitive service.

[795] See Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (Special Access Expanded Interconnection Order); recon. 8 FCC Rcd 127 (1992); second recon., 8 FCC Rcd 7341 (1993); vacated in part and remanded sub nom. Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (Bell Atlantic v. FCC); on remand Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 9 FCC Rcd 5154 (1994) (Expanded Interconnection Remand Order); see also Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-141 Transport Phase I, 8 FCC 7374 (1993) (Switched Transport Expanded Interconnection Order).

[796] See National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 184 (D.C. Cir. 1993)(National Rural Telecom Ass'n); see also id. at 182 ("deviations from fully distributed costs are in certain respects highly desirable and may tend to maximize the consumer welfare created by a regulated natural monopoly").

as productive as the incumbents, which is the condition for economically efficient entry.

411. Accordingly, we modify the lower bands that apply to the service categories within the traffic sensitive and trunking baskets. We conclude that 10 percent lower pricing bands would give the LECs a reasonable additional amount of downward pricing flexibility, without putting at risk our objectives of preventing predation and cross-subsidization. In addition, we increase the lower pricing bands that apply to density pricing zones from 10 percent to 15 percent, to ensure that LECs continue to have the opportunity to move their rate levels in particular geographic zones toward cost at the same time that they modify the aggregate rate levels in a service category.

412. While we expect to continue to modify the structure of LEC price cap baskets to reflect the introduction of new services and the development of competition, we believe it would be premature on the present record to take further steps in that direction. We are, however, prepared to consider further requests for waivers of our price cap rules to give greater pricing flexibility to individual LECs.[797] We are also willing to consider fundamental modifications such as those proposed by USTA. In either case, we will review such proposals in light of our underlying goal of facilitating the development of competition in local telephone markets.

413. Although USTA and NYNEX have submitted interesting proposals, we have decided to defer to a later phase of this proceeding our consideration of additional streamlining of price cap regulation to reflect broader local competition. With regard to Bell Atlantic and SNET's proposals that video dialtone be removed from price caps, we rejected such arguments in the Video Dialtone Reconsideration Order and we are currently considering whether to establish a separate price cap basket for video dialtone services in the Video Dialtone Further Notice.[798] Neither Bell Atlantic nor SNET have provided sufficient cause to revisit the issue in this order.

414. We agree, as we stated in the Video Dialtone Further Notice, that the rate of development of competition is likely to differ among price cap baskets, and that it will remain important to avoid grouping services with different levels of competition

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[797] See e.g., Rochester Telephone Corp. Order.

[798] Video Dialtone Reconsideration Order, 10 FCC Rcd at 321-24; Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, Further Notice of Proposed Rulemaking, CC Docket No. 94-1, FCC 95-49 (released Feb. 15, 1995) (Video Dialtone Further Notice).

in the same basket.[799] We established baskets originally in part to limit LEC ability to engage in anticompetitive cross-subsidization, that is, from shifting costs from services for which they face relatively high competition to services for which they face little or no competition.[800] Modifications to price cap baskets and bands may therefore be necessary as competition develops in local telephone markets. As the current record provides neither reliable standards for assessing competitiveness, nor sufficiently detailed information about the state of competition, however, we refrain from altering the composition of price cap baskets at this time.

415. The further notice will also solicit comment on proposals to reduce or streamline the Part 61 notice and cost support requirements for a new service based on the level of competition for that service. Because we plan to examine in the upcoming further notice the proposals submitted by USTA and others suggesting a framework for adapting price cap regulation to the emergence of competition for local services, we will not address the merits of these proposals (including their proposals for relaxing the Part 61 new services rules) in this proceeding.

416. In addition, because we only address the issues identified in the Notice as baseline, we do not address in this proceeding the merits of the proposal suggested by USTA and others that we undertake a comprehensive revision of the Commission's Part 69 rules. The commenters have not convinced us that the instant review of LEC price cap performance is the appropriate forum in which to conduct a review of the Part 69 rules. We note in this regard that substantial revisions to our Part 69 rules likely would affect significantly the interests of LECs that are not subject to the price cap system of regulation. Those carriers have not participated in this proceeding and are entitled to a fair opportunity to be heard on issues that affect them. Therefore, we do not anticipate that our consideration of the transition issues relating to the LEC price cap plan will include a review of the Part 69 rules.

417. The Commission designed the new services rules not only to assure reasonable rates and terms, but also to provide the LECs with the flexibility to price efficiently and the incentive to innovate. In adopting the new services test, the Commission did not intend to imply that the anti-discrimination provisions contained in Section 202(a) of the Communications Act would not apply to evaluating new service pricing. The potential for unreasonable discrimination between a new service and an existing service remains if: (1) the two services are "like"

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[799] Notice, 9 FCC Rcd at 1705.

[800] LEC Price Cap Order, 5 FCC Rcd at 6811.

services; (2) the two services are priced differently; and (3) there is no cost justification or other basis to support the discrimination.[801] The Commission retains the ability to address discrimination issues in the tariff review process, in response to a complaint filed pursuant to Section 208 of the Communications Act, or our own motion under Section 205 of the Act. We therefore find that MFS's cost consistency test, WilTel's price indexing approach, and ICA's price linking approach to the new services rules are not necessary to protect new service customers from unreasonable discrimination.[802]

418. The record in this proceeding does not support a finding that competition for LEC services is sufficiently widespread to constrain the pricing practices of LECs for new services. Accordingly, the Commission will continue to review new services tariff filings for possible discrimination. We will invite parties, however, in the further notice in this proceeding to suggest specific proposals for reducing the regulatory scrutiny afforded particular new LEC services as competition evolves in the marketplace.

## VII. REGULATORY FLEXIBILITY ACT ANALYSIS

419. In the Notice in this proceeding, we certified that the Regulatory Flexibility Act of 1980 did not apply to this rule making proceeding, because none of the rule amendments under consideration would have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers subject to price cap regulation for local exchange access affected by the rule amendments adopted in this Order are generally large corporations or affiliates of such corporations. Neither the Chief Counsel for Advocacy of the Small Business Administration nor any commenting party challenged our analysis. The Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 114, 5 U.S.C. § 601 et seq.

## VIII. ORDERING CLAUSES

420. Accordingly, IT IS ORDERED, pursuant to authority contained in Sections 4(i), 4(j), 201-205, 303(r), and 403 of the

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[801] MCI v. FCC, 842 F.2d 1296 (D.C. Cir. 1988); see also Third Further Reconsideration at para. 8.

[802] See also National Rural Telecom Ass'n at 182, 184.

Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 303(r), 403, and Section 553 of Title 5, United States Code, that Part 61 of the Commission's Rules, 47 C.F.R. Part 61 IS AMENDED as set forth in Appendix B.

421. IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Carrier Bureau, to determine what adjustments are necessary to the price cap indexes, actual price indexes, and service band indexes of local exchange carriers, to account for the effects of the revised effective date of the 1995 annual access filings of local exchange carriers under price cap regulation, and to establish a pleading cycle for review of those tariffs.

422. IT IS FURTHER ORDERED that the provisions in this Report and Order will be effective 30 days after FEDERAL REGISTER publication.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX A

### A. Parties Filing Comments to the Notice of Proposed Rulemaking

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Aeronautical Radio, Inc. (ARI)
American Library Association (ALA)
Ameritech (Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; The Ohio Bell Telephone Company; and Wisconsin Bell, Inc.)
Association for Local Telecommunications Services (ALTS)
AT&T Corporation (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
California Cable Television Association (CCTA)
Cincinnati Bell Telephone Company (CBT)
Citizens for a Sound Economy Foundation (CSE)
Competitive Telecommunications Association (CompTel)
Computer & Communications Industry Association (CCIA)
Council of Chief State School Officers, and the National Association of Secondary School Principals (Council of Schools)
Eagle Telephonics, Inc., Summa Four, Inc., LC Technologies, Inc., Ambox Incorporated, AmPro Corporation, Axes Technologies, Inc., Teradyne, Inc., Inovonics, Inc., Perception Technology Corp., OK Champion Corporation, Lingo, Inc., Tamaqua Cable Products Corp., Remarque Mfg. Corp., Rhetorex, Inc., Centigram Commun. Corp., HealthTech Services Corporation, American Reliance Inc., Senecom Voice Processing Systems, Technology Service Group, Intelect, Inc., filing jointly (Eagle)
General Services Administration (GSA)
GTE Service Corporation and its affiliated domestic telephone operating companies (GTE)
Intermedia Communications of Florida, Inc. (ICI)
International Communications Association (ICA)
The Lincoln Telephone and Telegraph Company (Lincoln)
MCI Telecommunications Corporation (MCI)
MFS Communications Company, Inc. (MFS)
The National Rural Telecom Association (NRTA)
The National Telephone Cooperative Association (NTCA)
The NYNEX Telephone Companies (NYNEX)
The Office of the Consumers' Counsel, State of Ohio (OCCO)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell (Pacific) and Nevada Bell (collectively, Pac Bell)
Pennsylvania Office of Consumer Advocate (PaOCA)
Rochester Telephone Corporation (RTC)
Senior Technologies, Inc. and XTP Systems, Inc., filing jointly (Senior)
Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SWB)
Sprint Corporation (Sprint)
Tele-Communications Association (TCA)
Teleport Communications Group, Inc. (TCG)
Time Warner Communications (Time)
United States Telephone Association (USTA)
US West Communications, Inc. (US West)
WilTel, Inc. (WilTel)

**B. Parties Filing Replies to the Notice of Proposed Rulemaking**

Ad Hoc
American Library Association, The Council of Chief State School Officers, The National Association of Secondary School Principals, National Education Association, and National School Boards Association, filing jointly (Educational Organizations)
American Petroleum Institute (API)
Ameritech
ALTS
AT&T
Bell Atlantic
BellSouth
BroadBand Technologies, Inc. (BroadBand)
CCIA
CCTA
CompTel
Cox Enterprises, Inc. (Cox)
CSE
GSA
GTE
Hyperion Telecommunications, Inc. (Hyperion)
International Communications Association (ICA)
Lincoln
MCI
MFS
National Association of Development Organizations (NADO)
Northern Telecom Inc. (NTI)
NYNEX
OCCO
OPASTCO
Pac Bell
Pacific Telecom, Inc. (PTI)
RTC
SNET
Sprint
State of Hawaii (Hawaii)
SWB
TCA
TCG
Time
USTA
US West
WilTel

## APPENDIX B

Part 61 of Title 47 of the Code of Federal Regulations is amended as follows:

## PART 61 -- TARIFFS

1. The authority citation continues to read as follows:

Authority: Secs. 1, 4(i), 4(j), 201-205, and 403 of the Communications Act of 1934, as amended; 47 U.S.C. 151, 154(i), 154(j), 201-205, and 403, unless otherwise noted.

2. Section 61.3 is amended by redesignating paragraphs (p) through (ll) as (q) through (mm), and by adding a new paragraph (p) to read as follows:

**§ 61.3 Definitions.**

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(p) *GDP Price Index* (GDP-PI). The estimate of the "Fixed Weight Price Index for Gross Domestic Product, 1987 Weights" published by the United States Department of Commerce, which the Commission designates by Order.

3. Section 61.45 is amended by revising paragraphs (b) and (c), the introductory portions of paragraphs (d) and (d)(1), paragraphs (d)(1)(ii), (d)(1)(vi), and (e) to read as follows:

**§ 61.45 Adjustments to the PCI for Local Exchange Carriers.**

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(b) Adjustments to local exchange carrier PCIs for the baskets designated in § 61.42(d)(2), (3) and (4) shall be made pursuant to the formula set forth in § 61.44(b), and as further explained in §§ 61.44(e), (f), (g), and (h).

(1) Notwithstanding the value of X defined in § 61.44(b), the X value applicable to the baskets specified in § 61.42(d)(2) and (3) shall be 4.0%, or 4.7%, or 5.3%, as the carrier elects.

(2) For the basket specified in § 61.42(d)(4), the value of X shall be 3.0%, or 3.7%, or 4.3%, as the carrier elects.

(c) Subject to paragraph (e) of this section, adjustments to local exchange carrier PCIs for the basket designated in § 61.42(d)(1) shall be made pursuant to the following formula:

$$PCI_1 = PCI_{t-1}[1+w[(GDP\text{-}PI - X - (g/2))/(1 + (g/2))] + \Delta Z/R]$$

where

GDP-PI = the percentage change in the GDP-PI between the quarter ending six months prior to the effective date of the new annual tariff and the corresponding quarter of the previous year,

X = productivity factor of 4.0%, or 4.7%, or 5.3% if the carrier so elects,

g = the ratio of minutes of use per access line during the base period, to minutes of use per access line during the previous base period, minus 1,

$\Delta Z$ = the dollar effect of current regulatory changes when compared to the regulations in effect at the time the PCI was updated to $PCI_{t-1}$, measured at base period level of operations,

R = base period quantities for each rate element "i", multiplied by the price for each rate element "i" at the time the PCI was updated to $PCI_{t-1}$,

w = $R + \Delta Z$, all divided by R,

$PCI_t$ = the new PCI value, and

$PCI_{t-1}$ = the immediately preceding PCI value.

(d) The exogenous cost changes represented by the term "$\Delta Z$" in the formula detailed in paragraphs (b) and (c) of this section shall be limited to those cost changes that the Commission shall permit or require by rule, rule waiver, or declaratory ruling.

(1) Subject to further order of the Commission, those exogenous changes shall include cost changes caused by:

*****

(ii) Such changes in the Uniform System of Accounts, including changes in the Uniform System of Accounts requirements made pursuant to § 32.16, as the Commission shall permit or require be treated as exogenous by rule, rule waiver, or declaratory ruling.

*****

(vi) Such tax law changes and other extraordinary cost changes as the Commission shall permit or require be treated as exogenous by rule, rule waiver, or declaratory ruling.

*****

(e) The "w[(GDP-PI - X - [g/2))/(1+(g/2))]" component of the PCI formula contained in paragraph (c) of this section shall be employed only in the adjustment made in connection with the annual price cap filing.

7. Section 61.47 is amended by revising paragraphs (e), (g)(1), (g)(2), (g)(4), and (h)(2) to read as follows:

**§ 61.47 Adjustments to the SBI; pricing bands.**

*****

(e) Pricing bands shall be established each tariff year for each service category and subcategory within a basket. Except as provided in paragraphs (f), (g), and (h) of this section, each band shall limit the pricing flexibility of the service category or subcategory, as reflected in the SBI, to an annual increase of five percent or an annual decrease of ten percent, relative to the percentage change in the PCI for that basket, measured from the levels in effect on the last day of the preceding tariff year.

*****

(g)(1) *Local Exchange Carriers - Service Categories and Subcategories.* Local exchange carriers subject to price cap regulation as that term is defined in § 61.3(w) shall use the methodology set forth in paragraphs (a) through (d) of this section to calculate two separate subindexes: One for the DS1 services offered by such carriers and the other for the DS3 services offered by such carriers. The annual pricing flexibility for each of these two subindexes shall be limited to an annual increase of five percent or an annual decrease of ten percent, relative to the percentage change in the PCI for the special access services basket, measured from the last day of the preceding tariff year.

(2) The upper pricing band for the tandem-switched transport service category shall limit the annual upward pricing flexibility for this service category, as reflected in its SBI, to two percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the preceding tariff year. The lower pricing band

for the tandem-switched transport service category shall limit the annual downward pricing flexibility for this service category, as reflected in its SBI, to ten percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the preceding tariff year.

*****

(4) Local exchange carriers subject to price cap regulation as that term is defined in §61.3(v) shall use the methodology set forth in paragraphs (a) through (d) of this section to calculate a separate subindex for the 800 data base vertical features offered by such carriers. The annual pricing flexibility for this subindex shall be limited to an annual increase of five percent or an annual decrease of ten percent, relative to the percentage change in the PCI for the traffic sensitive basket, measured from the last day of the preceding tariff year.

*****

(h) ***

(2) The annual pricing flexibility for each of the subindexes specified in paragraph (h)(1) of this section shall be limited to an annual increase of five percent or an annual decrease of fifteen percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the proceeding tariff year.

12. Section 61.48 is amended by revising paragraphs (h)(3)(ii)(B), (h)(5)(i), (i)(3)(ii)(B), and (i)(4)(ii) to read as follows:

**§ 61.48 Transition rules for price cap formula calculations.**

*****

(h) ***

(3) ***

(ii) ***

(B) 0.90 times the SBI value for the special access services included in the category or subcategory on the day preceding the transport restructure date, weighted by the revenue weight of the

transport services included in the category or subcategory.

*****

(5) ***

(i) The upper pricing band for the tandem-switched transport service category shall limit the upward pricing flexibility for this service category, as reflected in its SBI, to two percent, measured from the initial restructured rates for tandem-switched transport. The lower pricing band for the tandem-switched transport service category shall limit the downward pricing flexibility for this service category, as reflected in its SBI, to ten percent, measured from the initial restructured rates for tandem-switched transport.

*****

(i) ***

(3) ***

(ii) ***

(B) 0.85 times the SBI value for the services included in the zone category on the day preceding the later date, weighted by the revenue weight of the later services included in the zone category.

*****

(4) ***

(ii) From the later date through the end of the following tariff year, the annual pricing flexibility for each of the subindexes specified in paragraph (i)(4)(i) of this section shall be limited to an annual increase of five percent or an annual decrease of fifteen percent, relative to the percentage change in the PCI for the trunking basket, measured from the levels in effect on the last day of the tariff year preceding the tariff year in which the later date occurs.

*****

# APPENDIX C
# STATISTICAL DATA

Table 1

## Digital Switches

(from ARMIS 4307)

| Description | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| Total Switching Entities | 14,840 | 14,996 | 16,398 | 16,701 | 16,852 |
| Total DSPC Switches | 8,292 | 9,609 | 11,523 | 12,739 | 13,732 |
| Percent DSPC Switches | 55.88 | 64.08 | 70.27 | 76.28 | 81.49 |
| Total Access Lines | 110,036 | 113,735 | 123,022 | 125,778 | 129,642 |
| Total DSPC Lines Served | 46,704 | 55,428 | 64,873 | 73,815 | 85,543 |
| Percent DSPC Lines Served | 42.44 | 48.73 | 52.73 | 58.69 | 65.98 |

Table 2

## Switches Equipped with SS7-394 (InterLATA) Capabilities

(from ARMIS 4307)

| Description | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| Total Switching Entities | 14,840 | 14,996 | 16,398 | 16,701 | 16,852 |
| Total Switches Equipped with SS7-394 | 7 | 212 | 1,248 | 5,753 | 8,037 |
| Percent Switches Equipped with SS7-394 | 0.05 | 1.41 | 7.61 | 34.45 | 47.69 |
| Total Access Lines | 110,036 | 113,735 | 123,022 | 125,778 | 129,642 |
| Total Lines with Access to SS7-394 | 31 | 3,799 | 23,377 | 71,151 | 96,128 |
| Percent Lines with Access to SS7-394 | 0.03 | 3.34 | 19.00 | 56.57 | 74.15 |

Table 3

## Switches Equipped with SS7-317 (IntraLATA) Capabilities

(from ARMIS 4307)

| Description | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| Total Switching Entities | 14,840 | 14,996 | 16,398 | 16,701 | 16,852 |
| Total Switches Equipped with SS7-317 | 917 | 2,578 | 4,091 | 7,487 | 8,845 |
| Percent Switches Equipped with SS7-317 | 6.18 | 17.19 | 24.95 | 44.83 | 52.49 |
| Total Access Lines | 110,036 | 113,735 | 123,022 | 125,778 | 129,642 |
| Total Lines with Access to SS7-317 | 19,392 | 43,022 | 62,199 | 86,176 | 102,208 |
| Percent Lines with Access to SS7-317 | 17.62 | 37.83 | 50.56 | 68.51 | 78.84 |

Table 4

**RBOC Investment and Operating Data 1/**
**(Dollar amounts shown in Thousands)**

| | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | % Change From 1988-90 to 1991-93 |
|---|---|---|---|---|---|---|---|
| Plant Added During the Year | | | | | | | |
| Land and Support Assets | $2,408,531 | $2,371,599 | $2,572,178 | $2,428,708 | $2,639,043 | $2,384,094 | 1.1% |
| Central Office Switching | 4,103,566 | 3,601,703 | 3,631,402 | 3,601,953 | 3,474,221 | 3,536,551 | -6.5% |
| Central Office Transmission | 3,222,835 | 2,882,158 | 3,084,381 | 3,319,417 | 3,345,956 | 3,741,017 | 13.5% |
| Cable & Wire Facilities | 3,996,239 | 4,011,283 | 4,662,223 | 4,595,253 | 4,550,068 | 4,548,257 | 8.1% |
| Other | 608,508 | 541,452 | 582,852 | 703,691 | 632,406 | 884,363 | 16.6% |
| Total Additions to Plant In Service | 14,339,679 | 13,308,195 | 14,513,036 | 14,549,022 | 14,641,694 | 14,873,282 | 4.5% |
| Depreciation and Amortization Expense | 13,646,937 | 13,860,101 | 13,931,515 | 13,499,778 | 13,822,882 | 14,244,514 | 0.3% |
| Total Employee Compensation | 16,852,136 | 16,913,401 | 17,237,406 | 17,484,524 | 17,157,988 | 17,955,026 | 3.1% |
| Total Access Lines | 100,994,477 | 103,656,590 | 107,392,188 | 112,554,986 | 114,989,650 | 122,369,426 | 12.1% |
| Investment Trends | | | | | | | |
| New investment as a percentage of Depreciation | 105.1% | 96.0% | 104.2% | 107.8% | 105.9% | 104.4% | 4.2% |
| New investment as a percentage of Total Compensation | 85.1 | 78.7 | 84.2 | 83.2 | 85.3 | 82.8 | 1.4% |
| New investment per access line | 142 | 128 | 135 | 129 | 127 | 122 | -6.8% |

1/ Data from Statistics of Communications Common Carriers

Table 5

## Local Exchange Carriers
## Rate of Return Summary From
## October 1985 to December 1994
(Dollar amounts shown in millions)

| Company | Oct. 1, 1985 – Dec. 31, 1986 | | Jan.1, 1987 – Dec. 31, 1988 | | Jan. 1, 1989 – Dec. 31, 1990 | |
|---|---|---|---|---|---|---|
| | AVG NET INV (see note 1) | ROR | AVG NET INV (see note 1) | ROR | AVG NET INV (see note 1) | ROR |
| Ameritech | $2,924 | 12.65% | $3,027 | 11.44% | $3,000 | 12.21% |
| Bell Atlantic | $3,628 | 12.45% | $3,850 | 12.35% | $3,991 | 11.11% |
| BellSouth | $4,676 | 11.99% | $4,771 | 12.75% | $4,717 | 12.14% |
| Nynex | $4,147 | 10.78% | $4,272 | 12.01% | $4,284 | 11.10% |
| Pacific Tel | $2,869 | 13.15% | $2,877 | 13.16% | $2,599 | 12.74% |
| Southwestern | $3,545 | 12.71% | $3,367 | 12.32% | $3,217 | 11.73% |
| U S West | $4,029 | 12.77% | $3,893 | 12.64% | $3,704 | 12.75% |
| Centel | $351 | 12.80% | $360 | 13.31% | $371 | 12.06% |
| Contel | $448 | 13.20% | $682 | 12.80% | $809 | 11.95% |
| Cincinnati | $116 | 11.23% | $122 | 14.07% | $131 | 11.52% |
| GTE | $3,511 | 12.49% | $3,804 | 11.59% | $3,722 | 11.55% |
| Rochester | $89 | 12.25% | $117 | 12.46% | $126 | 10.72% |
| SNET | $440 | 12.08% | $496 | 11.86% | $510 | 12.02% |
| United | $1,012 | 12.50% | $1,035 | 13.04% | $1,042 | 12.26% |
| Lincoln | NA | NA | $61 | 12.29% | $58 | 11.51% |
| Total | $31,785 | 12.33% | $32,734 | 12.34% | $32,281 | 11.88% |
| Authorized ROR | | 12.75% | | 12.00% | | 12.00% |

Table 5
page 2

## Local Exchange Carriers
## Rate of Return Summary From
## October 1985 to December 1994
(Dollar amounts shown in millions)

| Company | Jan. 1, 1991 – Dec. 31, 1991 | | Jan. 1, 1992 – Dec. 31, 1992 | | Jan. 1, 1993 – Dec. 31, 1993 | | Jan. 1, 1994 – Dec. 31, 1994 Preliminary Form 492 | |
|---|---|---|---|---|---|---|---|---|
| | AVG NET INV (see note 2) | ROR | AVG NET INV (see note 2) | ROR | AVG NET INV (see note 1) | ROR | AVG NET INV (see note 1) | ROR |
| Ameritech | $2,935 | 13.00% | $3,006 | 12.79% | $2,998 | 14.80% | $2,919 | 13.05% |
| Bell Atlantic | $3,995 | 12.71% | $4,025 | 12.50% | $3,986 | 14.01% | $4,002 | 14.19% |
| BellSouth | $4,652 | 12.62% | $4,640 | 12.80% | $4,631 | 13.68% | $4,577 | 15.75% |
| Nynex | $4,223 | 9.35% | $3,947 | 12.50% | $3,835 | 12.55% | $3,706 | 11.82% |
| Pacific Tel | $2,465 | 11.89% | $2,475 | 12.73% | $2,520 | 13.01% | $2,491 | 15.15% |
| Southwestern | $3,188 | 10.75% | $3,080 | 11.80% | $3,103 | 12.91% | $3,168 | 13.25% |
| U S West | $3,646 | 12.40% | $3,621 | 12.41% | $3,564 | 13.62% | $3,698 | 12.36% |
| Centel | NA | NA | NA | NA | $321 | 14.05% | $326 | 16.93% |
| Contel (see note 3 | $534 | 15.53% | $819 | 10.06% | $804 | 15.79% | NA | NA |
| Cincinnati | NA | NA | NA | NA | NA | NA | NA | NA |
| GTE (see note 3) | $3,751 | 11.99% | $3,745 | 11.47% | $3,684 | 9.79% | $3,747 | 12.84% |
| Rochester | $80 | 11.62% | $184 | 12.27% | $202 | 13.75% | $196 | 14.71% |
| SNET | $128 | 8.86% | $507 | 12.90% | $498 | 11.52% | $495 | 11.34% |
| United | $1,027 | 13.06% | $1,011 | 12.75% | $990 | 13.68% | $994 | 16.96% |
| Lincoln | NA | NA | NA | NA | $52 | 14.95% | $49 | 15.52% |
| Total | $30,624 | 11.91% | $31,060 | 12.34% | $31,188 | 13.12% | $30,367 | 13.70% |
| Benchmark ROR | | 11.25% | | 11.25% | | 11.25% | | 11.25% |

**Notes:**

1 Industry Analysis Division Rate of Return Summary, FCC Form 492.
Centel, United, GTE and Contel rates of return are FCC generated.

2 USTA data dated Oct 17, 1994. USTA indicates that Centel and Lincoln's avg net inv represents one half the amount shown in the Form 492 because they became price cap LECs 7/1/93. This is also the case for Rochester and SNET for 1991.

3 For 1994, GTE and Contel's data are provided on an aggregated basis.

## Table 6

| | 1991 | 1992 | 1993 | 1994 | Total |
|---|---|---|---|---|---|
| **Total rate impact by year -- the difference between actual rates and those in effect in 1990** | | | | | |
| COMMON LINE | (430,999,530) | (881,329,177) | (628,406,252) | (470,907,382) | (2,391,642,34 |
| TRAFFIC SENSITIVE | (186,946,186) | (383,292,373) | (976,930,125) | (914,157,104) | (2,443,325,78 |
| SPECIAL ACCESS/TRUNKING | (38,376,988) | (48,325,469) | (213,104,184) | (705,497,586) | (1,005,304,22 |
| INTEREXCHANGE | (5,725,506) | (17,314,197) | (24,689,709) | (30,698,425) | (78,427,83 |
| TOTAL INTERSTATE ACCESS | (656,322,704) | (1,272,947,019) | (1,820,440,561) | (2,090,562,072) | (5,840,272,35 |
| TOTAL INTERSTATE | (662,048,210) | (1,290,261,216) | (1,845,130,270) | (2,121,260,497) | (5,918,700,19 |
| **Exogenous cost by calendar year (excluding sharing and LFAM)** | | | | | |
| COMMON LINE | (461,857,840) | (160,541,158) | 1,154,308,129 | 41,325,216 | 573,234,34 |
| TRAFFIC SENSITIVE | (310,415,636) | (208,543,649) | (747,080,784) | (4,404,955) | (1,270,445,02 |
| SPECIAL ACCESS/TRUNKING | (37,349,417) | (18,459,870) | (238,854,079) | (5,271,281) | (299,934,64 |
| INTEREXCHANGE | 153,943 | (137,786) | 1,425,493 | (837,207) | 804,46 |
| TOTAL INTERSTATE ACCESS | (809,622,893) | (387,544,676) | 168,373,296 | 31,648,980 | (997,145,32 |
| TOTAL INTERSTATE | (809,468,950) | (387,682,442) | 169,798,759 | 31,011,773 | (996,340,85 |
| Cumulative for year | (809,468,950) | (1,197,151,392) | (1,027,352,633) | (996,340,859) | (4,030,313,83 |
| **Revenues below Cap -- the difference between PCI and API Revenues** | | | | | |
| COMMON LINE | 3,747,480 | 45,239,180 | 196,929,846 | 309,944,299 | 555,860,80 |
| TRAFFIC SENSITIVE | 7,616,461 | 41,764,778 | 123,064,989 | 114,487,465 | 286,933,69 |
| SPECIAL ACCESS/TRUNKING | 19,123,056 | 42,038,051 | 54,059,515 | 126,165,960 | 241,386,58 |
| INTEREXCHANGE | 4,722,307 | 14,486,507 | 19,890,728 | 19,891,979 | 58,991,52 |
| TOTAL INTERSTATE ACCESS | 30,486,997 | 129,042,007 | 374,054,349 | 550,597,724 | 1,084,181,07 |
| TOTAL INTERSTATE | 35,209,304 | 143,528,514 | 393,945,077 | 570,489,703 | 1,143,172,59 |
| **Sharing and LFAM -- combined amouts** | | | | | |
| COMMON LINE | 0 | 848,415 | (21,152,300) | (49,537,159) | (69,841,04 |
| TRAFFIC SENSITIVE | 0 | 17,782,283 | (28,039,712) | (31,524,274) | (41,781,70 |
| SPECIAL ACCESS/TRUNKING | 0 | 36,626,247 | (526,899) | (68,469,778) | (32,370,43 |
| INTEREXCHANGE | 0 | (1,789,831) | (65,378) | (5,871,237) | (7,726,44 |
| TOTAL INTERSTATE ACCESS | 0 | 55,256,945 | (49,718,911) | (149,531,210) | (143,993,17 |
| TOTAL INTERSTATE | 0 | 53,467,114 | (49,784,288) | (155,402,448) | (151,719,62 |
| **Inflation, productivity factors actually selected, and the effect of traffic growth on the calculation of CCL rates** | | | | | |
| COMMON LINE | 34,606,789 | (194,539,415) | (942,233,238) | (684,660,272) | (1,786,827,1 |
| TRAFFIC SENSITIVE | 131,085,911 | 179,649,406 | 438,214,645 | 502,299,669 | 1,251,249,6 |
| SPECIAL ACCESS/TRUNKING | 18,095,485 | 12,895,622 | 136,145,596 | (210,927,202) | (43,790,4 |
| INTEREXCHANGE | (1,157,142) | (1,064,036) | (6,175,273) | (5,739,672) | (14,126,1 |
| TOTAL INTERSTATE ACCESS | 183,787,185 | (1,994,388) | (387,872,996) | (393,287,815) | (579,368,0 |
| TOTAL INTERSTATE | 182,630,043 | (3,048,424) | (374,048,272) | (399,027,487) | (593,494,1 |

Source: USTA Ex Parte, February 28, 1995 and March 17, 1995.

## APPENDIX D

## RECALCULATION OF THE FRENTRUP-URETSKY STUDY EXCLUDING THE 1984/85 DATA POINT

by Alexander Belinfante and Mark Uretsky[1]

### I. BACKGROUND AND CONCLUSIONS

As part of the Order establishing price caps for the LECs,[2] the Commission relied upon a short-run study (Frentrup-Uretsky study) of switched access productivity for the local exchange carriers.[3] That study was designed to determine the X-Factor that would have yielded the same trend of prices under the Commission's price-cap plan as was actually observed under rate-of-return regulation.

The short-run study took an observed trend of LEC access price data along with observed GNP-PI data and calculated the X-Factor that would have produced that trend, given the price-cap rules. The X-Factor computed by the short-run study, however, is not, strictly speaking, a productivity factor. Rather, the resulting factor combines productivity and input price information for the industry relative to the economy as a whole, to determine a cost differential between the LEC industry and the economy as a whole. Thus, it would be more appropriate to describe the X-Factor as a cost-differential factor rather than a productivity factor.

This appendix describes a staff study which makes a few technical revisions in the way the X-Factor was estimated and, more important, examines the impact of removing the controversial 1984/85 data point from the historical data used in the Frentrup-Uretsky study. No attempt is made here to update the data used in the study. This analysis is designed to determine the X-Factor that the original study would have produced if the Commission had decided to exclude that controversial data point. Thus, this analysis provides an independent estimate of MCI's claim that removal of this data point would increase the calculated X-Factor from this model by 2.0%.[4]

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1 Mr. Belinfante is Senior Economist and Mr. Uretsky is Chief Economist, Common Carrier Bureau, Federal Communications Commission.

2 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (Second Report and Order).

3 Appendix C, "A Study of Local Exchange Carrier Post-Divestiture Switched Acces Productivity," by J. Christopher Frentrup and Mark I. Uretsky, 5 FCC Rcd 6885.

4 MCI Comments, May 9, 1994, at 21.

At the time that the LEC price caps rules were adopted in 1990, there was much criticism of the inclusion of the 1984/85 data point.[5] Interested parties argued that the underlying data were unreliable due to the many changes that occurred as a result of AT&T's divestiture of its local exchange companies. Parties also submitted statistical analyses indicating that the data point was an anomalous "outlier". The Commission's position in 1990 was that the 1984/85 data point provided relevant information and should not be discarded. Subsequent experience, however, has convinced us that the critics were right, and the data point should have been excluded. We believe that the corrections we made to the 1984/85 data point in 1990 may have been insufficient to compensate for all of the disruptions caused by divestiture. Evidence provided by USTA's recent filings indicates that, using a TFP approach, with an adjustment for input prices, the X-Factor for the period 1984/85 to 1990 was 4.8%, which is close to our estimates that exclude the 1984/85 data point.[6] Furthermore, USTA's data show no unusual or out-of-trend growth for the 1984-1985 period, lending additional weight to the view that the 1984/85 data provided to the Commission in the original proceeding was erroneous and should be excluded. The high and growing rates of return experienced by the price cap LECs in recent years also provide evidence that the X-Factor was set too low and that the 1984/85 data was indeed out of line with subsequent experience.

Attachment A summarizes the X-Factors from the original study as compared with our revised estimates of the X-Factors both including and excluding the 1984/85 data point. The X-Factor of 3.5% that was originally estimated in the Frentrup-Uretsky study[7] (and used by the Commission to set the 3.3% X-Factor currently in use) has been re-estimated from the same data, but using a slightly revised methodology (described below) as 3.4%. Our estimate of this X-Factor using the same data but eliminating the 1984/85 data point is 5.0% (1.6% higher than our revised estimate including that data point).[8] This compares with the 5.47% estimate filed by MCI in their estimate of the impact of removing the 1984-/85 data point. The differences between their estimate and ours are due to differences in methodology and differences in the treatment of the 1990 data point.

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5 These criticisms and the Commission's response to them are summarized in the Second Report and Order, CC Docket No. 87-313, at 6892-6894.

6 The estimate excluding 1984/85 using the TFP approach adjusted for input prices is 4.9%. See Appendix F, Attachment A, of this Order.

7 This is the unitary balanced 50/50 X-Factor, as explained below.

8 The original study also computed prospective X-Factors, based on trend projections and assumptions about future growth of CCL minutes per line (the g-factor). The prospective unitary balanced 50/50 X-Factor in the original study was 3.4%. Our revised estimates of this X-Factor are 3.6% including the 1984/85 data point and 5.5% excluding the data point. The assumptions about the future growth of the g-factor in the original study proved to be incorrect

As noted below, calculations were done using alternate assumptions and methods to estimate the X-Factor. These resulted in estimates ranging from 5.0% to 5.2% for the unitary balanced 50/50 X-Factor when the 1984/85 data point is excluded, with our best estimate being 5.0%. This leads us to believe that during the post-divestiture pre-price cap period the cost differential between the LEC industry and the economy as a whole was about 5%. Averaging this short-term X-Factor with the long-term X-Factor of 2.1% produced by the Spavins-Lande study and adding a 0.5% consumer productivity dividend, as the Commission did in the LEC Price Caps Order, produces an X-Factor of 4.05%, which we will round down to 4.0%.

## II. ESTIMATION PROCEDURES

The study begins by estimating a trend of LEC access prices using 6 data points, corresponding to post-divestiture tariff review periods. A trend line is used to smooth variations in the data over time and to prevent undue influence on the results from the first and last periods. The average rate-of-change in these prices is then compared with changes in prices in the general economy (as measured by GNP-PI), and an X-Factor is estimated, using price-cap methodology, that would yield the same differential between GNP-PI and the LEC access price trend as observed from the data.

The calculations begin by estimating separately X-Factors for the common line basket and the traffic sensitive basket. (The special access basket was excluded due to the lack of reliable data for much of the pre-price-cap period, and the interexchange basket was excluded because the AT&T X-Factor was applied to that basket.) The X-Factors are determined so as to yield beginning and ending values of the access charge equal to the trend values. In the case of the common line basket, two separate estimates are made, one using the balanced 50/50 approach currently in use, and the other using a per-line approach, where g/2 is replaced by g in the price-cap formulas. For the balanced 50/50 approach, the common line X-Factor is chosen so that the CCL rate in the final period is the same as the CCL rate from the per-line formula. A unitary X-Factor is then computed for each of these two cases (balanced 50/50 and per-line) as a weighted average of the common line and traffic sensitive X-Factors. This is accomplished by choosing a unitary X-Factor that would result in there being no difference between the total revenue generated using that factor for both baskets, at the beginning and end of the observation period, and the total revenue generated by using the separately estimated individual X-Factors for the two baskets. The results of these calculations are summarized in Attachment A.

The differences between the methodology of this study and the Frentrup-Uretsky study are in the details of how the X-Factor is estimated from the historical data. These include: (1) This study used trend values for common line minutes of use per line, whereas Frentrup-Uretsky used actual values. Thus the g-factor in the price-cap formulas is constant over time in this study, but varied from year to year in the Frentrup-Uretsky study. (2) This study used trend values for GNP-PI, whereas Frentrup-Uretsky used actual values. Thus the GNP-PI factor in the price-cap formulas is constant over time in this study, but varied from year to year in the Frentrup-Uretsky study. The rationale for these two changes is that we are trying to determine the X-Factor associated with a trend of LEC

access prices. (3) This study uses actual average subscriber line charges, whereas Frentrup-Uretsky assumed that subscriber line charges were 61.38% of common line revenues in all years. Actual SLCs were used because they were substantially different from the 61.38% assumption, which seemed arbitrary. (4) This study computes the unitary X-Factor by finding the value that will result in the same total revenue for the sum of the common line and traffic sensitive baskets that would result from using the individual X-Factors. The Frentrup-Uretsky study, on the other hand, determined the unitary X-Factor as the value that would equate a weighted average of the percentage changes in the PCIs using the unitary X-Factor with a weighted average of the percentage changes in the PCIs using the individual X-Factors. The rationales for this change are that we decided that it was important that the X-Factor chosen be revenue neutral, and that the weights used in the Frentrup-Uretsky study are based on the arbitrary assumption of constant subscriber line charges.

To test the sensitivity of the results to various assumptions and methods, calculations were also done using alternative assumptions or methods. The results of these calculations are summarized in Attachment B. In general, the alternative assumptions resulted in estimates that were approximately equal to those shown in Attachment A, although there were small differences in the X-Factor estimates, the maximum of which was about 0.3%. The alternate assumptions and methods tried were: (1) The actual SLCs were replaced with constant $4 SLCs, the average level that was prevailing in 1994. This had no effect on the X-Factors. Thus the SLC assumption is not crucial to the estimates. (2) Instead of using the ending values of the access charges (in the cases of the non-unitary X-Factors) or total revenues (in the cases of the unitary X-Factors), a net present value of the differences of the access charges or total revenues over all the periods was computed, and the X-Factor was determined as the factor that would make the net present value equal to zero. This had no effect on the unitary, traffic sensitive, and per line common line X-Factors, but it reduced the common line balanced 50/50 X-Factor slightly. Using the net present value, the balanced 50/50 common line X-Factor was 4.9% (0.1% lower than the base case estimate) for the period excluding the 1984/85 data point. (3) The trend values of GNP-PI were replaced by actual values. This had the effect of increasing all of the X-Factors computed from the period including the 1984/85 data point by 0.3% (except the traffic sensitive X-Factor, which increased by 0.2%), and increasing all of the X-Factors computed from the period excluding the 1984/85 data point by 0.2%. The balanced 50/50 unitary X-Factor was 5.2% when the 1984/85 data point was excluded.

Attachment C contains the workpapers showing the calculations used to determine the X-Factors for the base case.

Belinfante-Uretsky
c:\pc\pathsum.wk3
March 29, 1995

Attachment A

# X-Factors
# From Staff Revision to
# FCC Short-Term Study

| | Original Study | New Study | | |
|---|---|---|---|---|
| | | Including 1984 | Excluding 1984 | Difference |
| Unitary Balanced 50/50 | 3.5% | 3.4% | 5.0% | 1.6% |
| Unitary Per Line | 3.0% | 2.5% | 4.0% | 1.5% |
| Common Line - Balanced 50/50 | 3.3% | 3.5% | 5.0% | 1.5% |
| Common Line - Per Line | 2.3% | 1.6% | 3.0% | 1.4% |
| Traffic Sensitive | 3.6% | 3.4% | 5.0% | 1.6% |

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c:\pc\pathsuma.wk3
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Attachment B

# X-Factors
# Using Alternate Methods
# FCC Short-Term Study

Including 1984

| | Base Case | Constant SLCs | NPV Closure | Actual GNP-PI |
|---|---|---|---|---|
| Unitary Balanced 50/50 | 3.4% | 3.4% | 3.4% | 3.7% |
| Unitary Per Line | 2.5% | 2.5% | 2.5% | 2.8% |
| Common Line - Balanced 50/50 | 3.5% | 3.5% | 3.4% | 3.8% |
| Common Line - Per Line | 1.6% | 1.6% | 1.6% | 1.9% |
| Traffic Sensitive | 3.4% | 3.4% | 3.4% | 3.6% |

Excluding 1984

| | Base Case | Constant SLCs | NPV Closure | Actual GNP-PI |
|---|---|---|---|---|
| Unitary Balanced 50/50 | 5.0% | 5.0% | 5.0% | 5.2% |
| Unitary Per Line | 4.0% | 4.0% | 4.0% | 4.2% |
| Common Line - Balanced 50/50 | 5.0% | 5.0% | 4.9% | 5.2% |
| Common Line - Per Line | 3.0% | 3.0% | 3.0% | 3.2% |
| Traffic Sensitive | 5.0% | 5.0% | 5.0% | 5.2% |

Difference

| | Base Case | Constant SLCs | NPV Closure | Actual GNP-PI |
|---|---|---|---|---|
| Unitary Balanced 50/50 | 1.6% | 1.6% | 1.6% | 1.5% |
| Unitary Per Line | 1.5% | 1.5% | 1.6% | 1.5% |
| Common Line - Balanced 50/50 | 1.6% | 1.6% | 1.5% | 1.5% |
| Common Line - Per Line | 1.4% | 1.4% | 1.4% | 1.4% |
| Traffic Sensitive | 1.7% | 1.7% | 1.7% | 1.6% |

# WORKPAPERS

Bellflante – Uretsky
c:\pc\path II
March 29, 1985

Path IT computes X factors using Period 0 closure and historical SLCs.
It computes the non-unitary per line and balanced 50/50 X's and the traffic sensitive
X's as well as the unitary X's for per line and balanced 50/50 formula.
It uses trend GNP-PI.
To print entire chart, invoke macro by keying (Alt m)
However, first make sure that your printer is initialized to landscape.

```
:prare{CE}              W          A:C8..A:C8
A:A1..A:H
64
~
g prare{CE}
B:A1..B:K
64
~
g pre{CE}
B:A66..B:
H85~
g pre{CE}
B:A86..B:
K123~
g pre{CE}
B:A124..B
:H168~
g prare{CE}
C:A1..C:L
61
~
g pre{CE}
C:A62..C:
H121~
g pre{CE}
C:A122..C
:H178~
g prare{CE}
D:A1..D:L
61
~
g pre{CE}
D:A62..D:
H121~
g pre{CE}
D:A122..D
:H178~
g prare{CE}
E:A1..E:F
107
~
copqg pre
{CE}
E:A108..E
:M177~
calqg pre
{CE}
E:A178..E
:M244~
```

Belinfante – Unitary
c:\pc\path11
March 29, 1996

UNITARY X – FACTOR FOR PLX – 1
Assumes (1) per line formula; (2) historical SLC; (3) CL/MOU iteration; and (4) close to Period 6 revenue.

| | |
|---|---|
| Unitary X – Factor | 2.6% |
| CL X – Factor | 1.6% |
| TS X – Factor | 3.4% |

| | Revenue |
|---|---|
| Period 6 Trend Rev | $10,053,734,777 |
| Period 6 Non – Unitary Rev | $10,053,734,777 |
| Period 6 Unitary Rev | $10,053,734,777 |
| Delta of Non – U and U | ($0) |
| %Delta | -0.00% |

TREND LINE ESTIMATES

| TREND | CL/MOU | TS/MOU | Tot SW/MOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|
| 7 | $0.033461 | $0.026361 | $0.059799 | 1.8379 | $6,732,610 | 201,270,167 | 109,511,003 | $4,895,929 | 185,344,666 |
| 19 | $0.032831 | $0.026423 | $0.059069 | 1.9220 | $7,063,714 | 217,063,063 | 112,948,824 | $5,380,249 | 204,000,029 |
| 32 | $0.031799 | $0.026490 | $0.058289 | 2.0174 | $7,484,799 | 235,618,663 | 116,795,236 | $5,995,603 | 220,334,707 |
| 50 | $0.030807 | $0.026662 | $0.057226 | 2.1573 | $8,077,630 | 263,924,367 | 122,336,076 | $6,947,334 | 261,362,275 |
| 63.5 | $0.029795 | $0.026652 | $0.056446 | 2.2987 | $8,663,287 | 287,363,655 | 126,987,160 | $7,759,121 | 291,127,098 |
| 80 | $0.029767 | $0.026736 | $0.056496 | 2.4125 | $9,172,820 | 310,650,803 | 132,166,839 | $8,881,214 | 332,163,187 |

TREND DATA FROM REGRESSIONS:

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| CL/MOU | $0.033461 | $0.032831 | $0.031799 | $0.030807 | $0.029795 | $0.029767 |
| CL MOU | 201,270,166,812 | 217,063,063,072 | 235,618,662,556 | 263,924,366,644 | 287,363,655,226 | 310,650,803,283 |
| CL Revenue | $6,732,609,662 | $7,063,714,084 | $7,484,799,666 | $8,077,630,057 | $8,663,286,923 | $9,172,820,464 |
| TS/MOU | $0.026361 | $0.026423 | $0.026490 | $0.026662 | $0.026652 | $0.026736 |
| TS MOU | 185,344,666,272 | 204,000,029,360 | 220,334,707,343 | 261,362,274,797 | 291,127,097,737 | 332,163,186,929 |
| TS Revenue | $4,886,929,186 | $5,390,249,179 | $5,995,603,424 | $6,947,333,691 | $7,759,121,440 | $8,881,214,323 |
| Total Revenue | $11,619,539,868 | $12,473,963,262 | $13,480,272,313 | $15,025,164,668 | $16,312,386,363 | $18,053,734,777 |

DATA FROM NON – UNITARY PLX1

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| SLC | $0.00 | $1.63 | $2.62 | $3.13 | $3.74 | $3.80 |
| Lines | 109,511,003 | 112,948,824 | 116,795,236 | 122,336,076 | 126,987,160 | 132,166,839 |
| SLC Revenue | $1,290,747,287 | $2,476,603,882 | $3,060,699,560 | $4,599,327,058 | $5,667,174,066 | $6,030,545,461 |
| CCL Rate | $0.027030 | $0.021223 | $0.016191 | $0.013218 | $0.009974 | $0.009664 |
| CL MOU | 201,270,166,812 | 217,063,063,072 | 235,618,662,556 | 263,924,366,644 | 287,363,655,226 | 310,650,803,283 |
| CCL Revenue | $5,441,862,695 | $4,607,110,222 | $3,814,832,330 | $3,488,803,799 | $2,866,092,227 | $3,141,974,963 |
| Total CL Revenue | $6,732,609,662 | $7,063,714,084 | $7,484,799,666 | $8,077,630,057 | $8,663,286,923 | $9,172,820,464 |
| TS/MOU | $0.026361 | $0.026423 | $0.026490 | $0.026662 | $0.026652 | $0.026736 |
| TS MOU | 185,344,666,272 | 204,000,029,360 | 220,334,707,343 | 261,362,274,797 | 291,127,097,737 | 332,163,186,929 |
| TS Revenue | $4,886,929,186 | $5,390,249,179 | $5,995,603,424 | $6,947,333,691 | $7,759,121,440 | $8,881,214,323 |
| Total Revenue | $11,619,539,868 | $12,473,963,262 | $13,480,272,313 | $15,025,164,668 | $16,312,386,363 | $18,053,734,777 |

DATA FROM UNITARY PLX1

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| SLC | $0.98 | $1.83 | $2.62 | $3.13 | $3.74 | $3.80 |
| Lines | 109,511,003 | 112,948,924 | 116,795,238 | 122,338,076 | 126,667,160 | 132,166,839 |
| SLC Revenue | $1,290,747,287 | $2,476,603,862 | $3,669,936,550 | $4,589,327,058 | $5,687,174,696 | $6,030,545,461 |
| CCL Rate | $0.027036 | $0.020934 | $0.015608 | $0.012258 | $0.008753 | $0.008339 |
| CL MOU | 201,270,166,812 | 217,083,063,072 | 235,618,662,556 | 263,924,366,644 | 287,363,655,226 | 318,856,903,283 |
| CCL Revenue | $5,441,862,595 | $4,544,406,673 | $3,677,465,645 | $3,235,199,616 | $2,515,420,356 | $2,659,029,052 |
| Total CL Revenue | $6,732,609,882 | $7,021,010,535 | $7,347,402,196 | $7,824,526,674 | $8,202,595,052 | $8,689,574,513 |
| TS/MOU | $0.026361 | $0.026654 | $0.026974 | $0.027424 | $0.027767 | $0.028191 |
| TS MOU | 185,344,668,272 | 204,000,029,350 | 226,334,707,343 | 261,352,274,797 | 291,127,097,737 | 332,163,186,926 |
| TS Revenue | $4,885,929,185 | $5,437,372,501 | $6,105,217,841 | $7,167,439,605 | $8,083,718,846 | $9,364,160,264 |
| Total Revenue | $11,618,539,068 | $12,458,383,037 | $13,452,620,037 | $14,991,966,279 | $16,286,313,898 | $18,053,734,777 |

DELTA BETWEEN NON–UNITARY AND TREND

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| CL Revenue | $0 | ($0) | ($0) | ($0) | ($0) | ($0) |
| TS Revenue | $0 | ($0) | ($0) | ($0) | ($0) | ($0) |
| Total Revenue | $0 | ($0) | ($0) | ($0) | ($0) | ($0) |

DELTA BETWEEN UNITARY AND NON–UNITARY

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| SLC Revenue | $0 | $0 | $0 | $0 | $0 | $0 |
| CCL Revenue | $0 | ($62,703,549) | ($137,366,693) | ($253,304,183) | ($350,671,871) | ($482,945,941) |
| TS Revenue | $0 | $47,123,323 | $109,714,417 | $220,105,804 | $324,597,406 | $482,945,941 |
| Total Revenue | $0 | ($15,580,226) | ($27,652,276) | ($33,198,379) | ($26,074,465) | $0 |

**UNITARY X-FACTOR FOR BFXI**
Assumes (1) balance 50/50 formula; (2) historical SLC; (3) CL/MOU iteration; and (4) close to Period 6 revenue.

| | |
|---|---|
| Unitary X-Factor | 3.4% |
| CL X-Factor | 3.6% |
| TS X-Factor | 3.4% |

| | Revenue |
|---|---|
| Period 6 Trend Rev | $10,063,734,777 |
| Period 6 Non-Unitary Rev | $10,063,734,777 |
| Period 6 Unitary Rev | $10,063,734,777 |
| Delta of Non-U and U | ($0) |
| %Delta | -0.00% |

**TREND LINE ESTIMATES**

| TREND | CL/MOU | TS/MOU | Tot SW/MOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|
| 7 | $0.033461 | $0.028361 | $0.059799 | 1.8378 | $6,732,610 | 201,270,187 | 109,511,003 | $4,895,829 | 185,344,666 |
| 19 | $0.032831 | $0.029423 | $0.059060 | 1.9220 | $7,083,714 | 217,083,083 | 112,948,824 | $5,390,240 | 204,000,029 |
| 32 | $0.031786 | $0.029460 | $0.058280 | 2.0174 | $7,484,788 | 235,618,663 | 118,786,236 | $5,995,803 | 226,334,707 |
| 50 | $0.030807 | $0.029562 | $0.057225 | 2.1573 | $8,077,631 | 263,924,397 | 122,336,078 | $6,647,334 | 251,362,276 |
| 63.5 | $0.029795 | $0.029562 | $0.059440 | 2.3987 | $8,863,287 | 297,303,666 | 126,667,160 | $7,756,121 | 291,127,696 |
| 80 | $0.028767 | $0.028736 | $0.057496 | 2.4126 | $9,172,820 | 319,050,803 | 132,166,839 | $8,991,214 | 332,163,187 |

**TREND DATA FROM REGRESSIONS:**

| | Period 1 6/84 - 6/85 | Period 2 6/85 - 5/86 | Period 3 7/86 - 6/87 | Period 4 1988 | Period 5 4/89 - 12/89 | Period 6 7/90 - 6/91 |
|---|---|---|---|---|---|---|
| CL/MOU | $0.033461 | $0.032831 | $0.031786 | $0.030807 | $0.029795 | $0.028767 |
| CL MOU | 201,270,186,812 | 217,083,083,072 | 235,618,662,556 | 263,924,396,644 | 297,303,656,226 | 319,050,803,283 |
| CL Revenue | $6,732,609,662 | $7,083,714,084 | $7,484,788,999 | $8,077,630,857 | $8,863,286,923 | $9,172,820,454 |
| TS/MOU | $0.028361 | $0.029423 | $0.029460 | $0.029562 | $0.029562 | $0.028736 |
| TS MOU | 185,344,666,272 | 204,000,029,360 | 226,334,707,343 | 251,362,274,797 | 291,127,697,737 | 332,163,186,026 |
| TS Revenue | $4,895,829,165 | $5,390,240,178 | $5,995,803,434 | $6,647,333,001 | $7,756,121,440 | $8,991,214,323 |
| Total Revenue | $11,618,439,060 | $12,473,953,262 | $13,480,272,313 | $15,085,164,858 | $16,312,388,363 | $18,063,734,777 |

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**DATA FROM NON-UNITARY PLX1**

DATA FROM NON-UNITARY PLX1

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| SLC | $0.96 | $1.83 | $2.62 | $3.13 | $3.74 | $3.80 |
| Lines | 109,511,003 | 112,948,924 | 116,795,238 | 122,338,076 | 126,667,160 | 132,166,839 |
| SLC Revenue | $1,290,747,287 | $2,476,603,862 | $3,669,936,550 | $4,589,327,058 | $5,687,174,696 | $6,030,545,461 |
| CCL Rate | $0.027036 | $0.021076 | $0.016032 | $0.012996 | $0.009942 | $0.009854 |
| CL MOU | 201,270,166,812 | 217,083,063,072 | 235,618,662,556 | 263,924,366,644 | 287,363,655,226 | 318,866,903,283 |
| CCL Revenue | $5,441,862,595 | $4,575,175,616 | $3,777,542,945 | $3,429,910,651 | $2,856,900,215 | $3,141,974,993 |
| Total CL Revenue | $6,732,609,882 | $7,051,779,478 | $7,447,479,495 | $8,019,237,709 | $8,544,074,911 | $9,172,520,454 |
| TS/MOU | $0.026361 | $0.026423 | $0.026490 | $0.026582 | $0.026652 | $0.026736 |
| TS MOU | 185,344,666,272 | 204,000,029,350 | 226,334,707,343 | 261,352,274,797 | 291,127,097,737 | 332,163,166,928 |
| TS Revenue | $4,886,929,185 | $5,390,249,178 | $5,995,503,424 | $6,947,333,801 | $7,759,121,440 | $8,881,214,323 |
| Total Revenue | $11,618,539,068 | $12,442,028,656 | $13,442,982,919 | $14,966,571,510 | $16,303,196,351 | $18,053,734,777 |

DATA FROM UNITARY PLX1

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| SLC | $0.96 | $1.83 | $2.62 | $3.13 | $3.74 | $3.80 |
| Lines | 109,511,003 | 112,948,924 | 116,795,238 | 122,338,076 | 126,667,160 | 132,166,839 |
| SLC Revenue | $1,290,747,287 | $2,476,603,862 | $3,669,936,550 | $4,589,327,058 | $5,687,174,696 | $6,030,545,461 |
| CCL Rate | $0.027036 | $0.021095 | $0.016072 | $0.013061 | $0.010026 | $0.009959 |
| CL MOU | 201,270,166,812 | 217,083,063,072 | 235,618,662,556 | 263,924,366,644 | 287,363,655,226 | 318,856,903,283 |
| CCL Revenue | $5,441,862,595 | $4,579,364,280 | $3,786,799,389 | $3,447,186,227 | $2,881,033,001 | $3,175,578,671 |
| Total CL Revenue | $6,732,609,882 | $7,055,968,142 | $7,456,735,940 | $8,036,513,285 | $8,568,207,697 | $9,206,124,132 |
| TS/MOU | $0.026361 | $0.026406 | $0.026455 | $0.026523 | $0.026574 | $0.026636 |
| TS MOU | 185,344,666,272 | 204,000,029,350 | 226,334,707,343 | 261,352,274,797 | 291,127,097,737 | 332,163,166,928 |
| TS Revenue | $4,886,929,185 | $5,386,891,266 | $5,987,724,860 | $6,931,637,917 | $7,736,389,392 | $8,847,610,645 |
| Total Revenue | $11,618,539,068 | $12,442,859,408 | $13,444,460,820 | $14,968,351,202 | $16,304,597,089 | $18,053,734,777 |

DELTA BETWEEN NON-UNITARY AND TREND

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| CL Revenue | $0 | ($31,934,606) | ($37,289,394) | ($58,593,148) | ($9,192,012) | ($0) |
| TS Revenue | $0 | ($0) | ($0) | ($0) | ($0) | ($0) |
| Total Revenue | $0 | ($31,934,606) | ($37,289,394) | ($58,593,148) | ($9,192,012) | ($0) |

DELTA BETWEEN UNITARY AND NON-UNITARY

| | Period 1 6/84 – 5/85 | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|---|
| SLC Revenue | $0 | $0 | $0 | $0 | $0 | $0 |
| CCL Revenue | $0 | $4,188,664 | $9,258,445 | $17,275,576 | $24,132,786 | $33,603,678 |
| TS Revenue | $0 | ($3,357,912) | ($7,778,544) | ($15,495,884) | ($22,732,048) | ($33,603,678) |

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Bellefonte-- Unitary
c:\pdpe\fx1\
March 20, 1996

UNITARY X

This spreadsheet calculates the per line and balanced 60/60 CL X-factor as well as the TS X-factor
Chart FLX1 calculates the per line X, given beginning and
ending CL/MOU rates from trend. Chart FLX1 also calculates an ending COL rate, which
is needed as input to balanced 60/60 chart
Chart BFX1 calculates the balanced
60/60 X, given beginning CL/MOU rate, the ending COL rate from Chart FLX1, and the
B.Cs from Chart FLX1

TREND LINE ESTIMATES

| TREND | Annualization Factors | CL/MOU | TS/MOU | Tot BW/MOU | CL MOU/Line | CL Rev | CL MOU | B.to Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|---|
| 7 | NA | 0.033481 | 0.036391 | 0.050709 | 1.037699 | 60,732,010 | 201,270,167 | 169,511,005 | 84,666,669 | 185,344,669 |
| 10 | 1.0000 | 0.039031 | 0.039433 | 0.050000 | 1.021000 | 67,063,714 | 217,053,000 | 112,040,004 | 86,360,240 | 204,000,000 |
| 32 | 1.0000 | 0.051700 | 0.050400 | 0.050300 | 2.017300 | 67,404,700 | 235,010,000 | 110,705,230 | 89,000,000 | 229,334,707 |
| 50 | 1.0000 | 0.050007 | 0.050002 | 0.057225 | 2.107330 | 69,077,031 | 269,024,207 | 122,330,070 | 93,047,334 | 261,262,270 |
| 60.5 | 1.1200 | 0.050700 | 0.050002 | 0.050443 | 2.200002 | 69,063,267 | 287,363,005 | 123,007,100 | 97,700,121 | 261,127,000 |
| 60 | 1.2000 | 0.050707 | 0.050720 | 0.050400 | 2.412030 | 69,172,000 | 310,000,000 | 132,100,030 | 99,001,214 | 332,100,107 |

ACTUALS

| TREND | Unadjusted CL Rev | Unadjusted B.C Rev | Actual Lines | B.Cs |
|---|---|---|---|---|
| 7 | 60,200,270 | 01,200,104 | 100,000,400 | 05.00 |
| 10 | 67,141,002 | 02,404,000 | 113,310,244 | 51.05 |
| 32 | 68,040,472 | 03,040,040 | 110,003,002 | 52.00 |
| 50 | 69,000,217 | 04,003,070 | 121,004,370 | 53.13 |
| 60.5 | 69,000,204 | 05,070,000 | 123,430,001 | 53.74 |
| 60 | 69,000,214 | 06,000,004 | 130,000,705 | 53.00 |

Calculation of Annual Change in GNPPI

| | GNPPI | Change in GNPPI | Estimated GNP--PI | |
|---|---|---|---|---|
| 4Q/93 | 127.0 | | 100.0 | |
| 4Q/94 | 127.1 | 0.0417 | 100.3 | 0.0000 |
| 4Q/94 | 110 | | 100.3 | |
| 4Q/95 | 110.0 | 0.0040 | 110.3 | 0.0000 |
| 2Q/96 | 114.7 | | 110.3 | |
| 2Q/97 | 110.0 | 0.0040 | 110.0 | 0.0000 |
| 2Q/97 | 110.7 | | 120.0 | |
| 2Q/98 | 120.0 | 0.0404 | 124.0 | 0.0000 |
| 4Q/98 | 120.2 | | 120.0 | |
| 4Q/99 | 131.4 | 0.0412 | 130.5 | 0.0000 |

ANNUAL FACTORS

| PERIOD | Change in GNPPI | g-factor |
|---|---|---|
| 1 | NA | NA |
| 2 | 3.0000% | 4.5730% |
| 3 | 3.0000% | 4.5730% |
| 4 | 3.0000% | 4.5730% |
| 5 | 3.0000% | 4.5730% |
| 6 | 3.0000% | 4.5730% |

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CHART BFX1

CHART BFX1

| | | |
|---|---|---|
| 1 CL X-Factor | 3.4% | |
| 2 Begining CL/MOU rate from trend | $0.03345 | |
| 3 Ending CCL/MOU Rate from PLX1 Non-Unitary | $0.00985 | |
| 4 Ending CCL/MOU rate for chosen X | $0.00996 | |
| 5 Delta for Ending CL/MOU | ($0.00011) | |
| 6 % Delta | -1.07% | |
| 7 | | |
| 8 PARAMETERS | | |
| 9 Growth in CL MOU | 7.8566% | |
| 10 Growth in Subscriber Lines | 3.1393% | |
| 11 Growth in MOU/Line: g-factor | 4.5736% | |
| 12 | | |
| 13 CALCULATIONS | | |

| 14 | Period 1 | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
|---|---|---|---|---|---|---|
| 15 | 6/84 - 5/85 | 6/85 - 5/86 | 7/86 - 6/87 | 1988 | 4/89 - 12/89 | 7/909 - 6/91 |
| 16 Step 1: Factors | | | | | | |
| 17 GNP-PI percent change | NA | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 18 CL X-Factor | 3.4% | 3.4% | 3.4% | 3.4% | 3.4% | 3.4% |
| 19 g-factor | 4.57% | 4.57% | 4.57% | 4.57% | 4.57% | 4.57% |
| 20 Annualization Factor | NA | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 21 Step 2: Calculating CL/MOU(t) from PCI | | | | | | |
| 22 CL/MOU (t-1) | NA | $0.033451 | $0.032759 | $0.032025 | $0.031036 | $0.030315 |
| 23 PCI (t-1) | NA | 100.00 | 97.93 | 95.74 | 92.78 | 90.63 |
| 24 1 + % Change in PCI | NA | 97.93% | 97.76% | 96.91% | 97.66% | 97.17% |
| 25 PCI (t) | 100.00 | 97.93 | 95.74 | 92.78 | 90.63 | 88.06 |
| 26 CL/MOU (t) | $0.033451 | $0.032759 | $0.032025 | $0.031036 | $0.030315 | $0.029456 |
| 27 Step 3: Calc of SLC/MOU(t) | | | | | | |
| 28 Monthly SLC | $0.98 | $1.83 | $2.62 | $3.13 | $3.74 | $3.80 |
| 29 CL MOU per line per month | 153.2 | 160.2 | 168.1 | 179.8 | 189.1 | 201.0 |
| 30 Lagged CL MOU/line/month * (1+g/2) | 153.2 | 156.7 | 164.1 | 173.9 | 184.4 | 195.0 |
| 31 SLC/MOU(t) | $0.006413 | $0.011664 | $0.015953 | $0.017975 | $0.020269 | $0.019497 |
| 32 Step 4: Calc CCL Rate | $0.027038 | $0.021095 | $0.016072 | $0.013061 | $0.010026 | $0.009959 |
| 33 | | | | | | |
| 34 | | | | | | |
| 35 CHART TS | | | | | | |
| 36 | | | | | | |
| 37 TS X-FACTOR | 3.4% | | | | | |
| 38 Beginning TS/MOU rate from trend | $0.026361 | | | | | |
| 39 Ending TS/MOU Rate from trend | $0.026736 | | | | | |
| 40 Ending TS/MOU Rate for Chosen X | $0.026636 | | | | | |
| 41 Delta for Ending TS/MOU | $0.000101 | | | | | |
| 42 % Delta | 0.378% | | | | | |
| 43 | | | | | | |
| 44 | | | | | | |

| 45 CALCULATIONS | Period 1 | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
|---|---|---|---|---|---|---|
| 46 | 6/84 - 5/85 | 6/85 - 5/86 | 7/86 - 6/87 | 1988 | 4/89 - 12/89 | 7/909 - 6/91 |
| 47 Step 1: Factors | | | | | | |
| 48 Annualization Factor | NA | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 49 GNP-PI Percentage Change | NA | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 50 TS X-Factor | NA | 3.4% | 3.4% | 3.4% | 3.4% | 3.4% |
| 51 Step 2: Calculate TS/MOU | | | | | | |
| 52 TS/MOU (t-1) | NA | $0.026361 | $0.026406 | $0.026455 | $0.026523 | $0.026574 |
| 53 PCI (t-1) | NA | 100.00 | 100.17 | 100.36 | 100.61 | 100.81 |
| 54 1 + % Change in PCI | N | 100.171% | 100.185% | 100.256% | 100.192% | 100.235% |
| 55 PCI (t) | 100.0 | 100.17 | 100.36 | 100.61 | 100.81 | 101.04 |
| 56 TS/MOU (t) | $0.026361 | $0.026406 | $0.026455 | $0.026523 | $0.026574 | $0.026636 |

CHART BFX1

| | |
|---|---|
| 1 CL X-Factor | 3.4% |
| 2 Begining CL/MOU rate from trend | $0.03345 |
| 3 Ending COL/MOU Rate from PLX1 Non-Unitary | $0.00995 |
| 4 Ending COL/MOU rate for chosen X | $0.00996 |
| 5 Delta for Ending CL/MOU | ($0.00011) |
| 6 % Delta | -1.07% |
| 7 | |
| 8 PARAMETERS | |
| 9 Growth in CL MOU | 7.8566% |
| 10 Growth in Subscriber Lines | 3.1393% |
| 11 Growth in MOU/Line: g-factor | 4.5736% |
| 12 | |
| 13 CALCULATIONS | |

| 14 | Period 1 6/84 - 5/85 | Period 2 6/85 - 5/88 | Period 3 7/88 - 6/87 | Period 4 1988 | Period 5 4/89 - 12/89 | Period 6 7/909 - 6/91 |
|---|---|---|---|---|---|---|
| 16 Step 1: Factors | | | | | | |
| 17 GNP-PI percent change | NA | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 18 CL X-Factor | 3.4% | 3.4% | 3.4% | 3.4% | 3.4% | 3.4% |
| 19 g-factor | 4.57% | 4.57% | 4.57% | 4.57% | 4.57% | 4.57% |
| 20 Annualization Factor | NA | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 21 Step 2: Calculating CL/MOU(t) from PCI | | | | | | |
| 22 CL/MOU (t-1) | NA | $0.033451 | $0.032759 | $0.032026 | $0.031036 | $0.030315 |
| 23 PCI (t-1) | NA | 100.00 | 97.93 | 95.74 | 92.76 | 90.63 |
| 24 1 + % Change in PCI | NA | 97.93% | 97.76% | 96.91% | 97.86% | 97.17% |
| 26 PCI (t) | 100.00 | 97.93 | 95.74 | 92.76 | 90.63 | 88.06 |
| 28 CL/MOU (t) | $0.033451 | $0.032759 | $0.032026 | $0.031036 | $0.030315 | $0.029456 |
| 27 Step 3: Calc of SLC/MOU(t) | | | | | | |
| 29 Monthly SLC | $0.99 | $1.83 | $2.82 | $3.13 | $3.74 | $3.80 |
| 29 CL MOU per line per month | 159.2 | 160.2 | 166.1 | 179.8 | 189.1 | 201.0 |
| 30 Lagged CL MOU/line/month * (1 + g2) | 159.2 | 156.7 | 164.1 | 173.9 | 184.4 | 195.0 |
| 31 SLC/MOU(t) | $0.009413 | $0.011884 | $0.015953 | $0.017975 | $0.020289 | $0.019497 |
| 32 Step 4: Calc COL Rate | $0.027038 | $0.021085 | $0.016072 | $0.013061 | $0.010026 | $0.009959 |
| 33 | | | | | | |
| 34 | | | | | | |
| 35 CHART TS | | | | | | |
| 36 | | | | | | |
| 37 TS X-FACTOR | 3.4% | | | | | |
| 38 Beginning TS/MOU rate from trend | $0.026361 | | | | | |
| 39 Ending TS/MOU Rate from trend | $0.026736 | | | | | |
| 40 Ending TS/MOU Rate for Chosen X | $0.026636 | | | | | |
| 41 Delta for Ending TS/MOU | $0.000101 | | | | | |
| 42 % Delta | 0.378% | | | | | |
| 43 | | | | | | |
| 44 | | | | | | |
| 45 CALCULATIONS | | | | | | |

| 46 | Period 1 6/84 - 5/85 | Period 2 6/85 - 5/86 | Period 3 7/86 - 6/87 | Period 4 1988 | Period 5 4/89 - 12/89 | Period 6 7/909 - 6/91 |
|---|---|---|---|---|---|---|
| 47 Step 1: Factors | | | | | | |
| 48 Annualization Factor | NA | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 49 GNP-PI Percentage Change | NA | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 50 TS X-Factor | NA | 3.4% | 3.4% | 3.4% | 3.4% | 3.4% |
| 51 Step 2: Calculate TS/MOU | | | | | | |
| 52 TS/MOU (t-1) | NA | $0.026361 | $0.026408 | $0.026455 | $0.026523 | $0.026574 |
| 53 PCI (t-1) | NA | 100.00 | 100.17 | 100.36 | 100.61 | 100.81 |
| | | [illegible] | [illegible] | 100.256% | 100.192% | 100.235% |

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 52 TS/MOU (t-1) | NA | $0.026361 | $0.026406 | $0.026455 | $0.026523 | $0.026574 | | | | | |
| | NA | 100.00 | 100.17 | 100.36 | 100.61 | 100.81 | | | | | |
| | | | | | 100.256% | 100.192% | 100.235% | | | | |

Belinfante - Unitary
c:\pc\path11
March 28, 1995

NON - UNITARY X
This spreadsheet calculates the per line and balanced 50/50 CL X - factor as well as the TS X - Factor
Chart PLX1 calculates the per line X, given beginning and
ending CL/MOU rates from trend. Chart PLX1 also calculates an ending CCL rate, which
is needed as input to balanced 50/50 chart.
Chart BFX1 calculates the balanced
50/50 X, given beginning CL/MOU rate, the ending CCL rate from Chart PLX1, and the
BLCs from Chart PLX1.

TREND LINE ESTIMATES

| TREND | Annualization Factors | CL/MOU | TS/MOU | Tot SW/MOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|---|
| 7 | NA | $0.033461 | $0.026361 | $0.059798 | 1.637886 | $6,732,610 | 201,270,167 | 108,611,003 | $4,865,889 | 165,344,889 |
| 16 | 1.0000 | $0.033831 | $0.026423 | $0.060260 | 1.661656 | $7,083,714 | 217,083,083 | 112,948,824 | $5,380,240 | 204,000,039 |
| 32 | 1.0000 | $0.031709 | $0.026460 | $0.058269 | 2.017386 | $7,494,760 | 235,810,083 | 116,795,230 | $5,885,830 | 229,334,707 |
| 50 | 1.0000 | $0.030807 | $0.026552 | $0.057228 | 2.157336 | $8,077,031 | 262,824,267 | 122,339,078 | $6,047,304 | 261,362,275 |
| 68.5 | 1.1250 | $0.030765 | $0.026552 | $0.057440 | 2.208852 | $8,053,287 | 267,353,888 | 120,697,100 | $7,760,121 | 291,127,089 |
| 89 | 1.3750 | $0.030737 | $0.026488 | $0.057425 | 2.412533 | $8,172,880 | 310,850,809 | 132,169,830 | $8,681,214 | 332,163,167 |

ACTUALS

| TREND | Unadjusted CL Rev | Unadjusted BLC Rev | Actual Lines | BLCs |
|---|---|---|---|---|
| 7 | $8,333,273 | $1,288,104 | 109,086,403 | $0 98 |
| 16 | $7,141,882 | $2,484,688 | 113,318,244 | $1 93 |
| 32 | $9,049,472 | $3,048,948 | 116,083,882 | $2 62 |
| 50 | $9,220,317 | $4,083,979 | 121,654,374 | $3 13 |
| 63.5 | $9,838,384 | $5,670,880 | 128,432,081 | $3 74 |
| 89 | $9,883,314 | $6,888,884 | 133,809,708 | $3 90 |

Calculation of Annual Change in GNPPI

| | GNPPI | Change in GNPPI | Estimated GNP - PI | |
|---|---|---|---|---|
| 4Q/83 | 387.0 | | 105 5 | |
| 4Q/84 | 397.1 | 0.0417 | 109 3 | 0.0360 |
| 4Q/84 | 110 | | 109 3 | |
| 4Q/85 | 113 8 | 0.0346 | 113 3 | 0.0360 |
| 2Q/86 | 114.7 | | 116 3 | |
| 2Q/87 | 118 8 | 0.0340 | 118 8 | 0.0360 |
| 2Q/87 | 119.7 | | 120 5 | |
| 2Q/88 | 124 8 | 0.0434 | 124 8 | 0.0360 |
| 4Q/88 | 128.2 | | 129 0 | |
| 4Q/89 | 131.4 | 0.0412 | 130 8 | 0.0360 |

ANNUAL FACTORS

| PERIOD | Change in GNPPI | g - factor |
|---|---|---|
| 1 | 3 6036% | NA |
| 2 | 3 6036% | 4 6736% |
| 3 | 3 6036% | 4 6736% |
| 4 | 3 6036% | 4 6736% |
| 5 | 3 6036% | 4 6736% |
| 6 | 3 6036% | 4 6736% |

CHART PLX1

| | | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
|---|---|---|---|---|---|---|
| | | 6/85 – 5/86 | 7/86 – 6/87 | 1988 | 4/89 – 12/89 | 7/90 – 6/91 |
| 1 CL X–FACTOR | 3.0% | | | | | |
| 2 Beginning CL/MOU rate from trend | $0.03492 | | | | | |
| 3 Ending CL/MOU Rate from trend | $0.02784 | | | | | |
| 4 Ending CL/MOU Rate for Chosen X | $0.02784 | | | | | |
| 5 Delta for Ending CL/MOU | $0.00000 | | | | | |
| 6 % Delta | 0.00% | | | | | |
| 7 | | | | | | |
| 8 PARAMETERS | | | | | | |
| 9 Growth in CL MOU | 8.5693% | | | | | |
| 10 Growth in Subscriber Lines | 3.2303% | | | | | |
| 11 Growth in MOU/Line: g–factor | 5.1912% | | | | | |
| 12 | | | | | | |
| 13 CALCULATIONS | | | | | | |
| 14 | | | | | | |
| 15 | | | | | | |
| 16 Step 1: Factors | | | | | | |
| 17 GNP–PI percent change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 18 CL X–Factor | | 3.0% | 3.0% | 3.0% | 3.0% | 3.0% |
| 19 g–factor | | 5.19% | 5.19% | 5.19% | 5.19% | 5.19% |
| 20 Annualization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 21 Step 2: Calculating CL/MOU(t) from PCI | | | | | | |
| 22 CL/MOU (t–1) | | NA | $0.034924 | $0.033277 | $0.031124 | $0.029602 |
| 23 PCI (t–1) | | NA | 100.00 | 96.28 | 89.12 | 84.76 |
| 24 1 + % Change in PCI | | NA | 96.28% | 93.53% | 95.11% | 94.05% |
| 25 PCI (t) | | 100.00 | 96.28 | 89.12 | 84.76 | 79.72 |
| 26 CL/MOU (t) | | $0.034924 | $0.033277 | $0.031124 | $0.029602 | $0.027841 |
| 27 Step 3: Calc of SLC/MOU(t) | | | | | | |
| 28 Monthly SLC | | $1.83 | $2.62 | $3.13 | $3.74 | $3.80 |
| 29 CL MOU per line per month | | 157.0 | 165.8 | 178.9 | 189.4 | 203.0 |
| 30 Lagged CL MOU/line/month * (1 + g) | | 157.0 | 165.8 | 178.9 | 189.4 | 203.0 |
| 31 SLC/MOU(t) | | $0.011641 | $0.015793 | $0.017476 | $0.019759 | $0.018730 |
| 32 Step 4: Calc CCL Rate | | $0.023283 | $0.017485 | $0.013849 | $0.009843 | $0.009111 |
| 33 | | | | | | |
| 34 | | | | | | |
| 35 CHART TS | | | | | | |
| 36 | | | | | | |
| 37 TS X–FACTOR | 5.0% | | | | | |
| 38 Beginning TS/MOU rate from trend | $0.027977 | | | | | |
| 39 Ending TS/MOU Rate from trend | $0.026012 | | | | | |
| 40 Ending TS/MOU Rate for Chosen X | $0.026012 | | | | | |
| 41 Delta for Ending TS/MOU | $0.000000 | | | | | |
| 42 % Delta | 0.00% | | | | | |
| 43 | | | | | | |
| 44 | | | | | | |
| 45 CALCULATIONS | | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
| 46 | | 6/85 – 5/86 | 7/86 – 6/87 | 1988 | 4/89 – 12/89 | 7/90 – 6/91 |
| 47 Step 1: Factors | | | | | | |
| 48 Annualization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 49 GNP–PI Percentage Change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 50 TS X–Factor | | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| 51 Step 2: Calculate TS/MOU | | | | | | |
| 52 TS/MOU (t–1) | | NA | $0.027977 | $0.027546 | $0.026960 | $0.026529 |
| 53 PCI (t–1) | | NA | 100.00 | 98.46 | 96.37 | 94.83 |
| 54 1 + % Change in PCI | | NA | 98.460% | 97.874% | 98.401% | 98.049% |
| 55 PCI (t) | | 100.00 | 98.46 | 96.37 | 94.83 | 92.96 |
| 56 TS/MOU (t) | | $0.027977 | $0.027546 | $0.026960 | $0.026529 | $0.026012 |



CHART BFX1

CHART BFX1

| | | | | | | |
|---|---|---|---|---|---|---|
| 1 CL X–Factor | 5.0% | | | | | |
| 2 Begining CL/MOU rate from trend | $0.03492 | | | | | |
| 3 Ending CCL/MOU Rate from PLX1 | $0.00911 | | | | | |
| 4 Ending CCL/MOU rate for chosen X | $0.00911 | | | | | |
| 5 Delta for Ending CL/MOU | $0.00000 | | | | | |
| 6 % Delta | 0.00% | | | | | |
| 7 | | | | | | |
| 8 PARAMETERS | | | | | | |
| 9 Growth in CL MOU | 8.5893% | | | | | |
| 10 Growth in Subscriber Lines | 3.2303% | | | | | |
| 11 Growth in MOU/Line: g–factor | 5.1912% | | | | | |
| 12 | | | | | | |
| 13 CALCULATIONS | | | | | | |
| 14 | | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
| 15 | | 6/85 – 5/86 | 7/86 – 6/87 | 1988 | 4/89 – 12/89 | 7/90 – 6/91 |
| 16 Step 1: Factors | | | | | | |
| 17 GNP–PI percent change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 18 CL X–Factor | | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| 19 g–factor | | 5.19% | 5.19% | 5.19% | 5.19% | 5.19% |
| 20 Annualization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 21 Step 2: Calculating CL/MOU(t) from PCI | | | | | | |
| 22 CL/MOU (t–1) | | NA | $0.034924 | $0.033442 | $0.031494 | $0.030108 |
| 23 PCI (t–1) | | NA | 100.00 | 95.76 | 90.18 | 86.21 |
| 24 1 + % Change in PCI | | NA | 95.76% | 94.17% | 95.60% | 94.65% |
| 25 PCI (t) | | 100.00 | 95.76 | 90.18 | 86.21 | 81.59 |
| 26 CL/MOU (t) | | $0.034924 | $0.033442 | $0.031494 | $0.030108 | $0.028496 |
| 27 Step 3: Calc of SLC/MOU(t) | | | | | | |
| 28 Monthly SLC | | $1.83 | $2.82 | $3.13 | $3.74 | $3.80 |
| 29 CL MOU per line per month | | 157.0 | 165.8 | 178.9 | 189.4 | 203.0 |
| 30 Lagged CL MOU/line/month * (1 + g/2) | | 157.0 | 161.4 | 172.3 | 184.1 | 196.2 |
| 31 SLC/MOU(t) | | $0.011641 | $0.016226 | $0.018143 | $0.020322 | $0.019384 |
| 32 Step 4: Calc CCL Rate | | $0.023283 | $0.017217 | $0.013351 | $0.009786 | $0.009111 |
| 33 | | | | | | |
| 34 | | | | | | |
| 35 CHART TS | | | | | | |
| 36 | | | | | | |
| 37 TS X–FACTOR | 5.0% | | | | | |
| 38 Beginning TS/MOU rate from trend | $0.027977 | | | | | |
| 39 Ending TS/MOU Rate from trend | $0.026012 | | | | | |
| 40 Ending TS/MOU Rate for Chosen X | $0.026012 | | | | | |
| 41 Delta for Ending TS/MOU | $0.000000 | | | | | |
| 42 % Delta | 0.00% | | | | | |
| 43 | | | | | | |
| 44 | | | | | | |
| 45 CALCULATIONS | | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
| 46 | | 6/85 – 5/86 | 7/86 – 6/87 | 1988 | 4/89 – 12/89 | 7/90 – 6/91 |
| 47 Step 1: Factors | | | | | | |
| 48 Annualization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 49 GNP–PI Percentage Change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 50 TS X–Factor | | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| 51 Step 2: Calculate TS/MOU | | | | | | |
| 52 TS/MOU (t–1) | | NA | $0.027977 | $0.027546 | $0.026960 | $0.026529 |
| 53 PCI (t–1) | | NA | 100.00 | 98.46 | 96.37 | 94.83 |
| 54 1 + % Change in PCI | | NA | 98.460% | 97.874% | 1.401% | 98.049% |
| 55 PCI (t) | | 100.00 | 98.46 | 96.37 | 94.83 | 92.96 |
| 56 TS/MOU (t) | | $0.027977 | $0.027546 | $0.026960 | $0.026529 | $0.026012 |

CALCULATION OF "TREND" VARIABLE for models of each census period

INPUT DATA FOR REGRESSION ANALYSIS FOR FRENTRUP - LIRETSKY STUDY
(000 MOU, tariff periods annualized)

| | A | B | C | D | E | F | G | H | I | J | K |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | TREND | Adj CL Rev | Adj CL MOU | CL/MOU | Adj TS Rev | TS MOU | TS/MOU | Tot Sw/MOU | Adj CL MOU | Sub Lines | CL MOU/Line |
| 6/84 - 5/85 | 7 | 99,333,273 | 207,772,422 | 0.003048 | 84,563,364 | 169,783,389 | 0.002439 | 0.0549 | 207,772,422 | 109,695,483 | 1.8934 |
| 6/85 - 5/86 | 19 | 97,141,822 | 215,343,094 | 0.003316 | 85,804,779 | 201,169,517 | 0.002788 | 0.0810 | 215,343,094 | 113,318,244 | 1.8004 |
| 7/86 - 6/87 | 32 | 99,048,472 | 224,686,813 | 0.003684 | 89,128,748 | 225,138,070 | 0.002723 | 0.0831 | 224,685,813 | 116,093,682 | 1.9354 |
| 1988 | 80 | 99,220,317 | 286,823,687 | 0.003092 | 87,229,563 | 283,972,546 | 0.002739 | 0.0583 | 286,823,687 | 121,654,374 | 2.1851 |
| 4/88 - 12/88 | 635 | 99,529,394 | 291,718,685 | 0.003824 | 94,001,630 | 286,351,330 | 0.002708 | 0.0683 | 291,718,685 | 126,432,081 | 2.3073 |
| 7/90 - 6/91 | 80 | 99,883,314 | 310,439,082 | 0.002775 | 99,253,356 | 327,697,289 | 0.002548 | 0.0532 | 310,439,082 | 133,009,705 | 2.4018 |

NOTE: This data agrees with Chart RATE and Chart DATA in LEC Price Cap Order

SOURCES:
Col A: Mid-point of tariff period, using June 1, 1984 as 1.
Cols B and C: Chart RATE, LEC Price Cap Order.
Col D: B/C
Cols E and F: Chart RATE, LEC Price Cap Order.
Col G: E/F
Col H: D+G
Cols I and J: Chart RATE, LEC Price Cap Order.
Col K: I/J

REGRESSION TREND FOR CL/MOU

| Intercept Dummy | TREND | CL/MOU | Ln(CL/MOU) | Estimated Ln(CL/MOU) | Estimated CL/MOU |
|---|---|---|---|---|---|
| 1 | 7 | 0.003481779 | -5.660622810 | -5.597686535 | 0.003748081 |
| 1 | 19 | 0.003163481 | -5.760830998 | -5.702248170 | 0.003683135 |
| 1 | 32 | 0.003635027 | -5.620622947 | -5.646344482 | 0.003178046 |
| 1 | 80 | 0.003823824 | -5.567822516 | -5.496853916 | 0.003680881 |
| 1 | 635 | 0.003235167 | -5.733230350 | -5.881443680 | 0.002784681 |
| 1 | 80 | 0.002774082 | -5.884044686 | -5.846853082 | 0.002870880 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.07830378 |
| R Squared | | 0.28380784 |
| No. of Observations | | 8 |
| Degrees of Freedom | | 4 |
| X Coefficient(s) | -5.583222088 | -0.00208837 |
| Std Err of Coef. | 0.08276080 | 0.00126240 |
| t-value | -63.81818182 | -1.61133218 |
| Annual growth rate | | -2.40% |

REGRESSION TREND FOR TS/MOU

| Intercept Dummy | TREND | TS/MOU | Ln(TS/MOU) | Estimated Ln(TS/MOU) | Estimated TS/MOU |
|---|---|---|---|---|---|
| 1 | 7 | 0.002437778 | -5.971408317 | -5.933668778 | 0.002938131 |
| 1 | 19 | 0.002788634 | -5.880882274 | -5.933852662 | 0.002942279 |
| 1 | 32 | 0.002722888 | -5.900556189 | -5.931000516 | 0.002940868 |
| 1 | 80 | 0.002730782 | -5.897888789 | -5.932751128 | 0.002939228 |
| 1 | 635 | 0.002708183 | -5.905551680 | -5.932488082 | 0.002939301 |
| 1 | 80 | 0.002847883 | -5.857003885 | -5.932488088 | 0.002873780 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.03737838 |
| R Squared | | 0.01082344 |
| No. of Observations | | 8 |
| Degrees of Freedom | | 4 |
| X Coefficient(s) | -5.933721853 | 0.00018411 |
| Std Err of Coef. | 0.04640027 | 0.00092782 |
| t-value | -80.11442100 | 0.20820091 |
| Annual growth rate | | 0.25% |

REGRESSION TREND FOR Tot SW/MOU

| Intercept Dummy | TREND | Tot SW/MOU | Ln(Tot SW/MOU) | Estimated Ln(Tot SW/MOU | Estimated Tot SW/MOU |
|---|---|---|---|---|---|
| 1 | 7 | 0.054488888 | -2.909287882 | -2.831677147 | 0.058708888 |
| 1 | 19 | 0.053102181 | -2.936524401 | -2.928804828 | 0.053808805 |
| 1 | 32 | 0.053088188 | -2.879383887 | -2.942348612 | 0.052838884 |
| 1 | 80 | 0.058831144 | -2.841188884 | -2.880788331 | 0.056722508 |
| 1 | 635 | 0.058327110 | -2.857857847 | -2.874674708 | 0.056440114 |
| 1 | 80 | 0.053222882 | -2.933388304 | -2.880148828 | 0.056488838 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.00478188 |
| R Squared | | 0.18248888 |
| No. of Observations | | 8 |
| Degrees of Freedom | | 4 |
| X Coefficient(s) | -2.880881001 | -0.00102307 |
| Std Err of Coef. | 0.05128783 | 0.00104773 |
| [illegible] | [illegible] | -0.97645888 |

**REGRESSION TREND FOR Tot CL MOU/Line**

| Intercept Dummy | TREND | Tot CL MOU/Line | Ln(CL MOU/Line) | Estimated Ln(CL MOU/Line) | Estimated CL MOU/Line | Regression Output: | | |
|---|---|---|---|---|---|---|---|---|
| 1 | 7 | 1.88843300 | 0.63627883 | 0.68662300 | 1.837888 | Constant | | 0 |
| 1 | 18 | 1.89837250 | 0.64204807 | 0.65334434 | 1.921958 | Std Err of Y Est | | 0.02778360 |
| 1 | 32 | 1.98536727 | 0.68626711 | 0.70178237 | 2.017305 | R Squared | | 0.94513439 |
| 1 | 50 | 2.10507447 | 0.76104091 | 0.76007424 | 2.137339 | No. of Observations | | 6 |
| 1 | 63.5 | 2.20736178 | 0.80607875 | 0.81918585 | 2.268632 | Degrees of Freedom | | 4 |
| 1 | 80 | 2.40162230 | 0.87814449 | 0.88687737 | 2.412533 | | | |
| | | | | | | X Coefficient(s) | 0.66253570 | 0.00372877 |
| | | | | | | Std Err of Coef. | 0.02196660 | 0.00044666 |
| | | | | | | t-value | 26.51673671 | 8.39662169 |
| | | | | | | Annual growth rate | | 4.56% |

NOTES:
This data agrees with Chart REG and Chart TREND in LEC Price Cap Order.
Constant toggle in LOTUS is set to zero in order to force LOTUS to compute
constant as coefficient of dummy variable. Otherwise, LOTUS will not output std error associate with constant.
SOURCES:
Chart RATE and Chart DATA in LEC Price Cap Order

**REGRESSION TREND FOR CL Rev ($000)**

| Intercept Dummy | TREND | CL Rev | Ln(CL Rev) | Estimated Ln(CL Rev) | Estimated CL Rev | Regression Output: | | |
|---|---|---|---|---|---|---|---|---|
| 1 | 7 | 66,333,273 | 18.0613 | 18.7226 | 66,732,610 | Constant | | 0 |
| 1 | 18 | 67,141,522 | 18.7814 | 18.7739 | 67,003,714 | Std Err of Y Est | | 0.05144306 |
| 1 | 32 | 68,048,472 | 18.0011 | 18.6264 | 67,484,760 | R Squared | | 0.99637006 |
| 1 | 50 | 68,229,317 | 18.0221 | 18.0048 | 68,077,831 | No. of Observations | | 6 |
| 1 | 63.5 | 68,526,304 | 18.0500 | 18.0818 | 68,553,267 | Degrees of Freedom | | 4 |
| 1 | 80 | 68,563,314 | 18.0874 | 18.0317 | 69,172,520 | | | |
| | | | | | | X Coefficient(s) | 18.99261930 | 0.00423620 |
| | | | | | | Std Err of Coef. | 0.04078648 | 0.00003187 |
| | | | | | | t-value | 385.83178739 | 5.00248681 |
| | | | | | | Annual growth rate | | 5.39% |

**REGRESSION TREND FOR CL MOU (000 MOU)**

| Intercept Dummy | TREND | CL MOU | Ln(CL MOU) | Estimated Ln(CL MOU) | Estimated CL MOU | Regression Output: | | |
|---|---|---|---|---|---|---|---|---|
| 1 | 7 | 267,772,422 | 19.1529 | 19.1262 | 201,270,167 | Constant | | 0 |
| 1 | 18 | 215,343,694 | 19.1877 | 19.1958 | 217,003,083 | Std Err of Y Est | | 0.030183415 |
| 1 | 32 | 224,626,813 | 19.2290 | 19.2777 | 235,615,083 | R Squared | | 0.97000066 |
| 1 | 50 | 266,823,807 | 19.3903 | 19.3912 | 269,624,307 | No. of Observations | | 6 |
| 1 | 63.5 | 291,716,066 | 19.4813 | 19.4763 | 297,363,666 | Degrees of Freedom | | 4 |
| 1 | 80 | 310,439,692 | 19.5521 | 19.5000 | 310,666,083 | | | |
| | | | | | | X Coefficient(s) | 19.97604006 | 0.006382662 |
| | | | | | | Std Err of Coef. | 0.023667430 | 0.000487764 |
| | | | | | | t-value | 769.24855066 | 12.92153064 |
| | | | | 7.0660% | | Annual growth rate | | 7.03191% |

**REGRESSION TREND FOR Lines**

| Intercept Dummy | TREND | Lines | Ln(Lines) | Estimated Ln(Lines) | Estimated Lines | Regression Output: | | |
|---|---|---|---|---|---|---|---|---|
| 1 | 7 | 100,065,483 | 18.8157 | 18.8115 | 109,511,003 | Constant | | 0 |
| 1 | 18 | 113,316,244 | 18.8457 | 18.8424 | 112,648,824 | Std Err of Y Est | | 0.005867546 |
| 1 | 32 | 118,063,662 | 18.8606 | 18.8758 | 116,706,236 | R Squared | | 0.994417563 |
| 1 | 50 | 121,854,374 | 18.8187 | 18.8223 | 122,330,078 | No. of Observations | | 6 |
| 1 | 63.5 | 126,432,661 | 18.8552 | 18.8571 | 126,007,100 | Degrees of Freedom | | 4 |
| 1 | 80 | 128,000,706 | 18.7866 | 18.8066 | 132,166,630 | | | |
| | | | | | | X Coefficient(s) | 18.48380435 | 0.002575661 |
| | | | | | | Std Err of Coef. | 0.004721040 | 0.000000490 |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 63.5 | 139,432,681 | 18.8552 | 18.8971 | 132,166,030 | X Coefficient(s) | 18.48390435 | 0.002575881 | |
| 1 | 80 | 139,606,766 | 18.7660 | 18.8998 | | Std Err of Coef. | 0.004721946 | 0.000066499 | |

REGRESSION TREND FOR TS Rev

| Intercept Dummy | TREND | TS Rev | Ln TS Rev | Estimated Ln TS Rev | Estimated TS Rev |
|---|---|---|---|---|---|
| 1 | 7 | $4,563,394 | 15.33137666 | 15.40187004 | $4,995,929 |
| 1 | 19 | $5,604,779 | 15.53913016 | 15.60010217 | $5,390,249 |
| 1 | 32 | $6,139,748 | 15.62999387 | 15.69852032 | $5,995,503 |
| 1 | 50 | $7,229,663 | 15.79399777 | 15.75398852 | $6,947,334 |
| 1 | 63.5 | $6,001,630 | 15.69515695 | 15.80437987 | $7,759,121 |
| 1 | 80 | $6,269,266 | 15.69817369 | 15.89944696 | $8,881,214 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.057566266 |
| R Squared | | 0.66070566 |
| No. of Observations | | 6 |
| Degrees of Freedom | | 4 |
| X Coefficient(s) | 15.34458706 | 0.008186011 |
| Std Err of Coef. | 0.046575844 | 0.000931406 |
| t-value | 330.6620361 | 8.788883307 |
| Inst. annual growth rate | | 10.2778% |
| yr/yr annual growth rate | | 10.3218% |

REGRESSION TREND FOR TS MOU

| Intercept Dummy | TREND | TS MOU | Ln TS MOU | Estimated Ln TS MOU | Estimated TS MOU |
|---|---|---|---|---|---|
| 1 | 7 | 188,783,366 | 19.04648003 | 19.03772783 | 185,344,686 |
| 1 | 19 | 201,169,617 | 19.11975282 | 19.13983070 | 204,000,029 |
| 1 | 32 | 225,139,070 | 19.23821563 | 19.23782647 | 226,334,707 |
| 1 | 50 | 283,972,646 | 19.36136566 | 19.36137977 | 281,382,276 |
| 1 | 63.5 | 296,361,330 | 19.50367615 | 19.46827040 | 291,127,099 |
| 1 | 80 | 327,897,259 | 19.60821066 | 19.62113693 | 332,169,187 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.013736699 |
| R Squared | | 0.999919706 |
| No. of Observations | | 6 |
| Degrees of Freedom | | 4 |
| X Coefficient(s) | 18.89178449 | 0.007991909 |
| Std Err of Coef. | 0.010099917 | 0.000222110 |
| t-value | 1746.444316 | 35.99024921 |
| Inst. annual growth rate | | 10.0233% |
| yr/yr annual growth rate | | 10.0852% |

REGRESSION TREND FOR GNP-FI

| Intercept Dummy | TREND | GNP-FI | Ln GNP-FI | Estimated Ln GNP-FI | Estimated GNP-FI |
|---|---|---|---|---|---|
| 1 | -5.5 | 105.6 | 4.66656907 | 4.66913739 | 105.6 |
| 1 | 6.5 | 110 | 4.70046037 | 4.69483974 | 109.3 |
| 1 | 18.5 | 113.8 | 4.73444262 | 4.72894209 | 113.3 |
| 1 | 24.5 | 114.7 | 4.74232002 | 4.74784327 | 115.3 |
| 1 | 30.5 | 116.6 | 4.77676640 | 4.76304662 | 118.5 |
| 1 | 39.5 | 119.7 | 4.78469981 | 4.78189921 | 120.5 |
| 1 | 51.5 | 124.9 | 4.82751342 | 4.82729857 | 124.9 |
| 1 | 54.5 | 128.2 | 4.83766705 | 4.83914915 | 128.0 |
| 1 | 66.5 | 131.4 | 4.87864911 | 4.87165161 | 130.6 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.005766275 |
| R Squared | | 0.994021212 |
| No. of Observations | | 9 |
| Degrees of Freedom | | 7 |
| X Coefficient(s) | 4.675363467 | 0.002950196 |
| Std Err of Coef. | 0.003404668 | 0.000068479 |

TREND LINE ESTIMATES

| TREND | CL MOU | TS MOU | Tot SWMOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|
| 7 | 0.03346081 | 0.02839131 | 0.05978966 | 1.837666 | $6,732,610 | 201,270,167 | 109,511,003 | $4,995,929 | 185,344,686 |
| 19 | 0.03283136 | 0.02842278 | 0.05909905 | 1.821058 | $7,093,714 | 217,083,083 | 112,949,924 | $5,390,249 | 204,000,029 |
| 32 | 0.03178645 | 0.02849855 | 0.05828864 | 2.017366 | $7,494,769 | 236,618,663 | 119,795,238 | $5,995,503 | 226,334,707 |
| | | | | 2.157339 | $8,077,831 | 263,824,387 | 122,338,078 | $6,947,334 | 281,382,276 |

Beinfante – Lifetsky
c:\pc\petfed
March 28, 1996

Petfed computes X factors excluding the 1994–95 data point.
Petfed computes X factors using Period 6 closure and historical SLCs.
It computes the non–unitary per line and balanced 60/40 X's and the traffic sensitive
X's as well as the unitary X's for per line and balanced 60/40 for mute.
It uses trend value of GNP – PI
To print entire chart, invoke macro by keying (Alt m)
However, first make sure that your printer is initialized to landscape.

```
:prs{CE}          \M          A:C14..A:C14
A:A1..A1
6s
~
g:prs{CE}
B:A1..BK
84
~
g:prs{CE}
B:A85..B:
H85~
g:prs{CE}
B:A85..B:
K120~
g:prs{CE}
B:A124..B
:H169~
g:prs{CE}
C:A1..C:L
61
~
g:prs{CE}
C:A82..C:
H121~
g:prs{CE}
C:A122..C
:H178~
g:prs{CE}
D:A1..D1
61
~
g:prs{CE}
D:A82..D:
H121~
g:prs{CE}
D:A122..D
:H179~
g:prs{CE}
E:A1..E:F
104
~
copqg:pr
{CE}
E:A105..E
:M174~
copqg:pr
{CE}
E:A176..E
:R241~
```

E:A176..E
:R241~

Bellatlantic - Unitary
c:\pc\pethxl
March 29, 1995

**UNITARY X - FACTOR FOR PLX - 1**
Assumes (1) per line formula; (2) historical SLC; (3) CL/MOU iteration; and (4) close to Period 6 revenue.

| | |
|---|---|
| Unitary X - Factor | 4.0% |
| CL X - Factor | 3.0% |
| TS X - Factor | 5.0% |

| | Revenue |
|---|---|
| Period 6 Trend Rev | $17,040,001,000 |
| Period 6 Non - Unitary Rev | $17,040,001,000 |
| Period 6 Unitary Rev | $17,040,001,000 |
| Delta of Non - U and U | $0 |
| %Delta | 0.00% |

**TREND LINE ESTIMATES**

| TREND | CL/MOU | TS/MOU | Tot SW/MOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|
| 19 | $0.034624 | $0.027877 | $0.062500 | 1.6635 | $7,407,332 | 212,000,552 | 112,007,000 | $5,675,125 | 202,650,000 |
| 32 | $0.033277 | $0.027648 | $0.060965 | 1.6997 | $7,717,054 | 231,903,285 | 116,553,695 | $6,210,540 | 225,481,540 |
| 50 | $0.031124 | $0.026000 | $0.056122 | 2.1469 | $8,167,499 | 262,414,167 | 122,240,000 | $7,039,287 | 260,007,000 |
| 63.5 | $0.029002 | $0.026529 | $0.054153 | 2.2724 | $8,522,424 | 287,903,000 | 126,000,150 | $7,726,574 | 291,200,121 |
| 80 | $0.027641 | $0.026012 | $0.053637 | 2.4361 | $8,977,276 | 322,444,300 | 132,360,595 | $8,063,027 | 333,000,150 |

**TREND DATA FROM REGRESSIONS:**

| | Period 2 6/95 - 5/96 | Period 3 7/96 - 6/97 | Period 4 1998 | Period 5 4/99 - 12/99 | Period 6 7/00 - 6/01 |
|---|---|---|---|---|---|
| CL/MOU | $0.034624 | $0.033277 | $0.031124 | $0.029002 | $0.027641 |
| CL MOU | 212,000,552,042 | 231,903,284,970 | 262,414,166,635 | 287,903,005,594 | 322,444,300,268 |
| CL Revenue | $7,407,331,000 | $7,717,053,561 | $8,167,499,190 | $8,522,424,024 | $8,977,275,000 |
| TS/MOU | $0.027877 | $0.027648 | $0.026000 | $0.026529 | $0.026012 |
| TS MOU | 202,650,000,400 | 225,481,540,236 | 260,007,000,423 | 291,200,120,674 | 333,000,150,797 |
| TS Revenue | $5,675,125,370 | $6,210,540,434 | $7,039,288,800 | $7,726,573,667 | $8,063,026,734 |
| Total Revenue | $13,082,457,236 | $13,927,830,015 | $15,206,784,990 | $16,249,297,691 | $17,040,001,000 |

**DATA FROM NON - UNITARY PLX1**

| | Period 2 6/95 - 5/96 | Period 3 7/96 - 6/97 | Period 4 1998 | Period 5 4/99 - 12/99 | Period 6 7/00 - 6/01 |
|---|---|---|---|---|---|
| SLC | $1.83 | $2.02 | $3.13 | $3.74 | $3.80 |
| Lines | 112,007,000 | 116,553,695 | 122,240,000 | 126,000,150 | 132,360,595 |
| SLC Revenue | $2,469,121,717 | $3,092,349,501 | $4,585,000,007 | $5,000,000,400 | $6,039,340,140 |
| CCL Rate | $0.023283 | $0.017485 | $0.013040 | $0.009043 | $0.009111 |
| CL MOU | 212,000,552,042 | 231,903,284,970 | 262,414,166,635 | 287,903,005,594 | 322,444,300,268 |
| CCL Revenue | $4,938,210,140 | $4,054,737,060 | $3,581,670,181 | $2,633,667,618 | $2,937,934,910 |
| Total CL Revenue | $7,407,331,000 | $7,717,053,561 | $8,167,499,190 | $8,522,424,024 | $8,977,275,000 |
| TS/MOU | $0.027877 | $0.027648 | $0.026000 | $0.026529 | $0.026012 |
| TS MOU | 202,650,000,400 | 225,481,540,236 | 260,007,000,423 | 291,200,120,674 | 333,000,150,797 |
| TS Revenue | $5,675,125,370 | $6,210,540,434 | $7,039,288,799 | $7,726,573,666 | $8,063,026,732 |
| Total Revenue | $13,082,457,236 | $13,927,830,015 | $15,206,784,987 | $16,249,297,690 | $17,040,001,000 |

DATA FROM UNITARY PLX1

| | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/90 – 6/91 |
|---|---|---|---|---|---|
| SLC | $1.83 | $2.62 | $3.13 | $3.74 | $3.80 |
| Lines | 112,607,690 | 116,553,685 | 122,246,668 | 126,698,158 | 132,359,585 |
| SLC Revenue | $2,469,121,717 | $3,662,346,501 | $4,585,898,007 | $5,688,566,406 | $6,039,340,149 |
| CCL Rate | $0.023283 | $0.017117 | $0.012835 | $0.008738 | $0.007697 |
| CL MOU | 212,098,552,042 | 231,903,284,970 | 262,414,196,835 | 287,903,965,594 | 322,444,300,286 |
| CCL Revenue | $4,938,210,149 | $3,969,457,167 | $3,367,986,188 | $2,515,767,346 | $2,481,832,940 |
| Total CL Revenue | $7,407,331,866 | $7,631,803,668 | $7,953,884,195 | $8,204,333,752 | $8,521,173,089 |
| TS/MOU | $0.027977 | $0.027849 | $0.027672 | $0.027541 | $0.027381 |
| TS MOU | 202,850,880,408 | 225,461,548,235 | 260,987,809,423 | 291,260,120,674 | 333,068,159,797 |
| TS Revenue | $5,675,125,370 | $6,278,826,404 | $7,222,162,688 | $8,021,560,450 | $9,119,728,711 |
| Total Revenue | $13,082,457,235 | $13,910,630,072 | $15,176,046,883 | $16,225,894,203 | $17,640,901,800 |

DELTA BETWEEN NON–UNITARY AND TREND

| | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/90 – 6/91 |
|---|---|---|---|---|---|
| CL Revenue | $0 | ($0) | ($0) | ($0) | ($0) |
| TS Revenue | $0 | ($0) | ($1) | ($1) | ($2) |
| Total Revenue | $0 | ($0) | ($1) | ($2) | ($3) |

DELTA BETWEEN UNITARY AND NON–UNITARY

| | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/909 – 6/91 |
|---|---|---|---|---|---|
| SLC Revenue | $0 | $0 | $0 | $0 | $0 |
| CCL Revenue | $0 | ($85,279,913) | ($213,584,003) | ($318,090,271) | ($456,101,980) |
| TS Revenue | $0 | $68,279,970 | $185,875,889 | $294,686,585 | $456,101,980 |
| Total Revenue | $0 | ($16,999,943) | ($27,708,114) | ($23,403,687) | $0 |

**UNITARY X-FACTOR FOR BFXI**

Assumes (1) balance 50/50 formula; (2) historical SLC; (3) CL/MOU iteration; and (4) close to Period 6 revenue.

| | |
|---|---|
| Unitary X-Factor | 6.6% |
| CL X-Factor | 6.6% |
| TS X-Factor | 6.6% |

| | Revenue |
|---|---|
| Period 6 Trend Rev | $17,049,891,609 |
| Period 6 Non-Unitary Rev | $17,049,891,790 |
| Period 6 Unitary Rev | $17,049,891,790 |
| Delta of Non-U and U | $0 |
| %Delta | 0.00% |

**TREND LINE ESTIMATES**

| TREND | CL/MOU | TS/MOU | Tot SW/MOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|
| 19 | $0.034924 | $0.027977 | $0.062909 | 1.8535 | $7,407,332 | 212,099,552 | 112,607,990 | $5,675,125 | 202,860,800 |
| 32 | $0.033277 | $0.027546 | $0.060855 | 1.9067 | $7,717,094 | 231,903,296 | 116,563,995 | $6,210,548 | 225,461,548 |
| 50 | $0.031124 | $0.026000 | $0.056122 | 2.1466 | $8,167,499 | 262,414,197 | 122,249,899 | $7,039,287 | 260,867,809 |
| 63.5 | $0.029902 | $0.026520 | $0.056163 | 2.2724 | $8,522,424 | 287,003,995 | 126,369,156 | $7,728,674 | 291,260,121 |
| 80 | $0.027841 | $0.026012 | $0.053837 | 2.4361 | $8,977,275 | 322,444,300 | 132,360,595 | $8,693,827 | 333,099,199 |

**TREND DATA FROM REGRESSIONS:**

| | Period 2 6/86 - 5/88 | Period 3 7/88 - 6/87 | Period 4 1988 | Period 5 4/89 - 12/89 | Period 6 7/90 - 6/91 |
|---|---|---|---|---|---|
| CL/MOU | $0.034924 | $0.033277 | $0.031124 | $0.029902 | $0.027841 |
| CL MOU | 212,099,552,042 | 231,903,294,970 | 262,414,199,636 | 287,003,995,994 | 322,444,300,299 |
| CL Revenue | $7,407,331,998 | $7,717,093,581 | $8,167,499,199 | $8,522,424,024 | $8,977,275,099 |
| TS/MOU | $0.027977 | $0.027546 | $0.026000 | $0.026520 | $0.026012 |
| TS MOU | 202,860,800,406 | 225,461,548,236 | 260,867,809,423 | 291,260,120,974 | 333,099,199,797 |
| TS Revenue | $5,675,125,379 | $6,210,548,434 | $7,039,286,800 | $7,728,673,987 | $8,663,626,734 |
| Total Revenue | $13,082,457,236 | $13,927,630,015 | $15,203,784,999 | $16,249,297,991 | $17,040,901,803 |

DATA FROM NON–UNITARY PLX1

| | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/90 – 6/91 |
|---|---|---|---|---|---|
| SLC | $1.83 | $2.62 | $3.13 | $3.74 | $3.80 |
| Lines | 112,607,690 | 116,553,685 | 122,246,668 | 126,698,156 | 132,359,585 |
| SLC Revenue | $2,469,121,717 | $3,662,346,501 | $4,585,898,007 | $5,686,566,406 | $6,039,340,149 |
| CCL Rate | $0.023283 | $0.017217 | $0.013351 | $0.009786 | $0.009111 |
| CL MOU | 212,098,552,042 | 231,903,284,970 | 262,414,196,836 | 287,903,965,594 | 322,444,300,286 |
| CCL Revenue | $4,936,210,149 | $3,992,572,018 | $3,503,478,812 | $2,817,418,726 | $2,937,934,918 |
| Total CL Revenue | $7,407,331,866 | $7,654,918,518 | $8,089,376,818 | $8,505,985,132 | $8,977,275,067 |
| TS/MOU | $0.027977 | $0.027546 | $0.026960 | $0.026529 | $0.026012 |
| TS MOU | 202,850,880,408 | 225,461,548,235 | 260,987,809,423 | 291,260,120,674 | 333,068,159,797 |
| TS Revenue | $5,675,125,370 | $6,210,546,434 | $7,036,286,799 | $7,726,873,866 | $8,663,626,732 |
| Total Revenue | $13,082,457,235 | $13,865,464,952 | $15,125,663,617 | $16,232,858,998 | $17,640,901,799 |

DATA FROM UNITARY PLX1

| | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/90 – 6/91 |
|---|---|---|---|---|---|
| SLC | $1.83 | $2.62 | $3.13 | $3.74 | $3.80 |
| Lines | 112,607,690 | 116,553,685 | 122,246,668 | 126,698,156 | 132,359,585 |
| SLC Revenue | $2,469,121,717 | $3,662,346,501 | $4,585,898,007 | $5,686,566,406 | $6,039,340,149 |
| CCL Rate | $0.023283 | $0.017218 | $0.013353 | $0.009789 | $0.009116 |
| CL MOU | 212,098,552,042 | 231,903,284,970 | 262,414,196,836 | 287,903,965,594 | 322,444,300,286 |
| CCL Revenue | $4,936,210,149 | $3,992,825,853 | $3,504,123,862 | $2,818,389,926 | $2,939,346,152 |
| Total CL Revenue | $7,407,331,866 | $7,655,172,354 | $8,090,021,868 | $8,506,956,332 | $8,978,686,301 |
| TS/MOU | $0.027977 | $0.027545 | $0.026958 | $0.026526 | $0.026007 |
| TS MOU | 202,850,880,406 | 225,461,548,235 | 260,987,809,423 | 291,260,120,674 | 333,068,159,797 |
| TS Revenue | $5,675,125,370 | $6,210,330,823 | $7,035,704,304 | $7,725,955,654 | $8,662,215,498 |
| Total Revenue | $13,082,457,235 | $13,865,503,177 | $15,125,726,173 | $16,232,911,986 | $17,640,901,799 |

DELTA BETWEEN NON–UNITARY AND TREND

| | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/90 – 6/91 |
|---|---|---|---|---|---|
| CL Revenue | $0 | ($62,165,062) | ($78,091,380) | ($16,439,892) | ($2) |
| TS Revenue | $0 | ($0) | ($1) | ($1) | ($2) |
| Total Revenue | $0 | ($62,165,063) | ($78,091,381) | ($16,439,893) | ($4) |

DELTA BETWEEN UNITARY AND NON–UNITARY

| | Period 2 6/85 – 5/86 | Period 3 7/86 – 6/87 | Period 4 1988 | Period 5 4/89 – 12/89 | Period 6 7/90 – 6/91 |
|---|---|---|---|---|---|
| SLC Revenue | $0 | $0 | $0 | $0 | $0 |
| CCL Revenue | $0 | $253,836 | $645,050 | $971,200 | $1,411,234 |
| TS Revenue | $0 | ($215,811) | ($582,495) | ($918,213) | ($1,411,236) |

| | | | | | |
|---|---|---|---|---|---|
| CCL Revenue | $0 | $253,836 | $645,050 | $971,200 | $1,411,234 |
| TS Revenue | $0 | ($215,811) | ($583,405) | ($918,218) | |

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March 29, 1996

UNITARY X

This spreadsheet calculates the per line and balanced 50/50 CL X–factor as well as the TS X–factor. Chart PLX1 calculates the per line X, given beginning and ending CL/MOU rates from trend. Chart PLX1 also calculates an ending CCL rate, which is needed as input to balanced 50/50 chart. Chart BFX1 calculates the balanced 50/50 X, given beginning CL/MOU rate, the ending CCL rate from Chart PLX1, and the B.Cs from Chart PLX1.

TREND LINE ESTIMATES

| TREND | Annualization Factors | CL/MOU | TS/MOU | Tot SWA/MOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|---|
| 10 | 1.0000 | $0.034884 | $0.027977 | $0.062860 | 1,668817 | $7,407,332 | 212,000,002 | 112,007,000 | $6,670,126 | 202,000,000 |
| 20 | 1.0000 | $0.033277 | $0.027540 | $0.060818 | 1,668860 | $7,717,004 | 231,000,265 | 119,563,665 | $6,310,640 | 225,401,648 |
| 30 | 1.0000 | $0.031126 | $0.026960 | $0.058086 | 2,148860 | $8,197,466 | 262,414,187 | 122,340,000 | $7,030,267 | 260,007,000 |
| 39.5 | 1.1250 | $0.029668 | $0.026539 | $0.056207 | 2,272381 | $8,522,434 | 267,000,263 | 123,000,183 | $7,720,074 | 291,200,151 |
| 50 | 1.2750 | $0.027844 | $0.026012 | $0.053857 | 2,438134 | $8,977,275 | 282,444,269 | 132,200,000 | $8,000,867 | 300,000,165 |

ACTUALS

| TREND | Unadjusted CL Rev | Unadjusted B.C Rev | Actual Lines | B.Cs |
|---|---|---|---|---|
| 10 | $7,141,882 | $3,494,889 | 113,319,244 | $1.03 |
| 20 | $8,049,472 | $3,049,849 | 110,000,002 | $2.02 |
| 30 | $8,230,317 | $4,000,870 | 121,004,374 | $3.13 |
| 39.5 | $8,000,304 | $4,070,850 | 120,430,001 | $3.74 |
| 50 | $8,000,314 | $3,000,894 | 120,000,765 | $3.00 |

Calculation of Annual Change in GNPPI

| | GNPPI | Change in GNPPI | Estimated GNP–PI | |
|---|---|---|---|---|
| 4Q/93 | 207.0 | | | |
| 4Q/94 | 207.1 | 0.0017 | | |
| 4Q/94 | 110 | | 100.3 | |
| 4Q/95 | 112.0 | 0.0040 | 112.3 | 0.0031 |
| 2Q/96 | 114.7 | | 115.3 | |
| 2Q/97 | 116.0 | 0.0040 | 116.5 | 0.0031 |
| 2Q/97 | 116.7 | | 122.5 | |
| 2Q/98 | 121.0 | 0.0404 | 124.0 | 0.0031 |
| 4Q/98 | 122.2 | | 128.0 | |
| 4Q/99 | 124.4 | 0.0412 | 128.0 | 0.0031 |

ANNUAL FACTORS

| PERIOD | Change in GNPPI | g–factor |
|---|---|---|
| 1 | 3.0121% | 0.1012% |
| 2 | 3.0121% | 0.1012% |
| 3 | 3.0121% | 0.1012% |
| 4 | 3.0121% | 0.1012% |
| 5 | 3.0121% | 0.1012% |

CHART PLX1

| | | | | | | |
|---|---|---|---|---|---|---|
| 1 CL X-FACTOR | 4.0% | | | | | |
| 2 Beginning CL/MOU rate from trend | $0.03482 | | | | | |
| 3 Ending CL/MOU Rate from trend | $0.02784 | | | | | |
| 4 Ending CL/MOU Rate for Chosen X | $0.02643 | | | | | |
| 5 Delta for Ending CL/MOU | $0.00141 | | | | | |
| 6 % Delta | 5.06% | | | | | |
| 7 | | | | | | |
| 8 PARAMETERS | | | | | | |
| 9 Growth in CL MOU | 8.5883% | | | | | |
| 10 Growth in Subscriber Lines | 3.2303% | | | | | |
| 11 Growth in MOU/Line: g-factor | 5.1812% | | | | | |
| 12 | | | | | | |
| 13 CALCULATIONS | | | | | | |
| 14 | | Period 2 6/95 – 5/96 | Period 3 7/96 – 6/97 | Period 4 1998 | Period 5 4/98 – 12/98 | Period 6 7/99 – 6/01 |
| 15 | | | | | | |
| 16 Step 1: Factors | | | | | | |
| 17 GNP-PI percent change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 18 CL X-Factor | | 4.0% | 4.0% | 4.0% | 4.0% | 4.0% |
| 19 g-factor | | 5.18% | 5.18% | 5.18% | 5.18% | 5.18% |
| 20 Annuelization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 21 Step 2: Calculating CL/MOU(t) from PCI | | | | | | |
| 22 CL/MOU (t-1) | | NA | $0.034824 | $0.032809 | $0.030310 | $0.028497 |
| 23 PCI (t-1) | | NA | 100.00 | 94.23 | 88.79 | 81.60 |
| 24 1 + % Change in PCI | | NA | 94.23% | 82.10% | 94.02% | 92.74% |
| 25 PCI (t) | | 100.00 | 94.23 | 88.79 | 81.60 | 75.67 |
| 26 CL/MOU (t) | | $0.034824 | $0.032809 | $0.030310 | $0.028497 | $0.026427 |
| 27 Step 3: Calc of SLC/MOU(t) | | | | | | |
| 28 Monthly SLC | | $1.83 | $2.62 | $3.13 | $3.74 | $3.60 |
| 29 CL MOU per line per month | | 157.0 | 166.8 | 176.8 | 188.4 | 203.0 |
| 30 Lagged CL MOU/line/month * (1 + g) | | 157.0 | 166.8 | 176.8 | 188.4 | 203.0 |
| 31 SLC/MOU(t) | | $0.011641 | $0.015703 | $0.017478 | $0.019759 | $0.018730 |
| 32 Step 4: Calc CCL Rate | | $0.023283 | $0.017117 | $0.012835 | $0.008738 | $0.007697 |
| 33 | | | | | | |
| 34 | | | | | | |
| 35 CHART TS | | | | | | |
| 36 | | | | | | |
| 37 TS X-FACTOR | 4.0% | | | | | |
| 38 Beginning TS/MOU rate from trend | $0.027977 | | | | | |
| 39 Ending TS/MOU Rate from trend | $0.026612 | | | | | |
| 40 Ending TS/MOU Rate for Chosen X | $0.027361 | | | | | |
| 41 Delta for Ending TS/MOU | ($0.001368) | | | | | |
| 42 % Delta | -5.265% | | | | | |
| 43 | | | | | | |
| 44 | | | | | | |
| 45 CALCULATIONS | | Period 2 6/95 – 5/96 | Period 3 7/96 – 6/97 | Period 4 1998 | Period 5 4/98 – 12/98 | Period 6 7/99 – 6/01 |
| 46 | | | | | | |
| 47 Step 1: Factors | | | | | | |
| 48 Annuelization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 49 GNP-PI Percentage Change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 50 TS X-Factor | | 4.0% | 4.0% | 4.0% | 4.0% | 4.0% |
| 51 Step 2: Calculate TS/MOU | | | | | | |
| 52 TS/MOU (t-1) | | NA | $0.027977 | $0.027849 | $0.027672 | $0.027541 |
| 53 PCI (t-1) | | NA | 100.00 | 99.54 | 98.91 | 98.44 |
| 54 1 + % Change in PCI | | NA | 99.542% | 99.367% | 99.525% | 99.419% |
| 55 PCI (t) | | 100.00 | 99.54 | 98.91 | 98.44 | 97.87 |
| 56 TS/MOU (t) | | $0.027977 | $0.027849 | $0.027672 | $0.027541 | $0.027361 |



CHART BFX1

| | | | | | | |
|---|---|---|---|---|---|---|
| 44 TS/MOU (t) | | $0.027977 | $0.027649 | $0.027672 | $0.027541 | $0.027361 |

CHART BFX1

| | | | | | | |
|---|---|---|---|---|---|---|
| 1 CL X-Factor | 5.0% | | | | | |
| 2 Begining CL/MOU rate from trend | $0.03492 | | | | | |
| 3 Ending CCL/MOU Rate from PLX1 Non-Unitary | $0.00911 | | | | | |
| 4 Ending CCL/MOU rate for chosen X | $0.00912 | | | | | |
| 5 Delta for Ending CL/MOU | ($0.00000) | | | | | |
| 6 % Delta | -0.05% | | | | | |
| 7 | | | | | | |
| 8 PARAMETERS | | | | | | |
| 9 Growth in CL MOU | 6.5883% | | | | | |
| 10 Growth in Subscriber Lines | 3.2303% | | | | | |
| 11 Growth in MOU/Line: g-factor | 5.1912% | | | | | |
| 12 | | | | | | |
| 13 CALCULATIONS | | | | | | |
| 14 | | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
| 15 | | 6/85 - 5/88 | 7/88 - 6/87 | 1988 | 4/89 - 12/89 | 7/90 - 6/91 |
| 16 Step 1: Factors | | | | | | |
| 17 GNP-PI percent change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 18 CL X-Factor | | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| 19 g-factor | | 5.19% | 5.19% | 5.19% | 5.19% | 5.19% |
| 20 Annualization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 21 Step 2: Calculating CL/MOU(t) from PCI | | | | | | |
| 22 CL/MOU (t-1) | | NA | $0.034924 | $0.033443 | $0.031487 | $0.030111 |
| 23 PCI (t-1) | | NA | 100.00 | 95.76 | 90.19 | 86.22 |
| 24 1 + % Change in PCI | | NA | 95.76% | 94.18% | 95.60% | 94.65% |
| 25 PCI (t) | | 100.00 | 95.76 | 90.19 | 86.22 | 81.61 |
| 26 CL/MOU (t) | | $0.034924 | $0.033443 | $0.031487 | $0.030111 | $0.028500 |
| 27 Step 3: Calc of SLC/MOU(t) | | | | | | |
| 28 Monthly SLC | | $1.83 | $2.02 | $3.13 | $3.74 | $3.80 |
| 29 CL MOU per line per month | | 157.0 | 165.8 | 178.8 | 189.4 | 203.0 |
| 30 Lagged CL MOU/line/month * (1 + g/2) | | 157.0 | 161.4 | 172.3 | 184.1 | 196.2 |
| 31 SLC/MOU(t) | | $0.011641 | $0.012228 | $0.018143 | $0.020322 | $0.018984 |
| 32 Step 4: Calc CCL Rate | | $0.023283 | $0.017218 | $0.013363 | $0.009789 | $0.009116 |
| 33 | | | | | | |
| 34 | | | | | | |
| 35 CHART TS | | | | | | |
| 36 | | | | | | |
| 37 TS X-FACTOR | 5.0% | | | | | |
| 38 Beginning TS/MOU rate from trend | $0.027977 | | | | | |
| 39 Ending TS/MOU Rate from trend | $0.026012 | | | | | |
| 40 Ending TS/MOU Rate for Chosen X | $0.026007 | | | | | |
| 41 Delta for Ending TS/MOU | $0.000004 | | | | | |
| 42 % Delta | 0.016% | | | | | |
| 43 | | | | | | |
| 44 | | | | | | |
| 45 CALCULATIONS | | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
| 46 | | 6/85 - 5/88 | 7/88 - 6/87 | 1988 | 4/89 - 12/89 | 7/90 - 6/91 |
| 47 Step 1: Factors | | | | | | |
| 48 Annualization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 49 GNP-PI Percentage Change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 50 TS X-Factor | | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| 51 Step 2: Calculate TS/MOU | | | | | | |
| 52 TS/MOU (t-1) | | NA | $0.027977 | $0.027545 | $0.026938 | $0.026526 |
| | | NA | 100.00 | 98.46 | 96.36 | 94.81 |

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March 29, 1988

NON – UNITARY X
This spreadsheet calculates the par line and balanced 50/50 CL X – factor as well as the TS X – Factor
Chart PLX1 calculates the par line X, given beginning and
ending CL/MOU rates from trend. Chart PLX1 also calculates an ending CCL rate, which
is needed as input to balanced 50/50 chart.
Chart BFX1 calculates the balanced
50/50 X, given beginning CL/MOU rate, the ending CCL rate from Chart PLX1, and the
SLCs from Chart PLX1.

TREND LINE ESTIMATES

| TREND | Annualization Factors | CL/MOU | TS/MOU | Tot SW/MOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|---|
| 10 | 1.0000 | $0.034884 | $0.027877 | $0.062809 | $1.063617 | $7,407,332 | 212,089,862 | 112,607,890 | $6,676,125 | 202,660,860 |
| 32 | 1.0833 | $0.033877 | $0.027540 | $0.060966 | $1.060969 | $7,717,094 | 231,803,286 | 118,553,695 | $6,210,940 | 225,481,546 |
| 80 | 1.8000 | $0.031124 | $0.026860 | $0.058182 | $2.146569 | $8,187,488 | 282,414,187 | 122,340,699 | $7,030,287 | 260,867,900 |
| 63.5 | 1.1333 | $0.030602 | $0.026530 | $0.057183 | $2.272381 | $8,532,424 | 287,003,088 | 139,698,168 | $7,720,674 | 291,260,121 |
| 80 | 1.2766 | $0.027841 | $0.026012 | $0.053837 | $2.439124 | $8,877,276 | 322,444,300 | 132,388,695 | $8,693,487 | 333,088,189 |

ACTUALS

| TREND | Unadjusted CL Rev | Unadjusted SLC Rev | Actual Lines | SLCs |
|---|---|---|---|---|
| 10 | $7,141,882 | $2,494,856 | 113,318,244 | $1.83 |
| 32 | $8,040,472 | $3,040,040 | 110,083,882 | $2.68 |
| 80 | $8,280,317 | $4,083,878 | 121,884,374 | $3.13 |
| 63.5 | $8,888,384 | $5,670,880 | 138,438,081 | $3.74 |
| 80 | $8,888,314 | $8,088,004 | 133,008,708 | $3.80 |

Calculation of Annual Change in GNPPI

| | GNPPI | Change in GNPPI | Estimated GNP – PI | |
|---|---|---|---|---|
| 4Q/83 | 227.6 | | | |
| 4Q/84 | 237.1 | 0.0417 | | |
| 4Q/84 | 110 | | 108.3 | |
| 4Q/86 | 113.6 | 0.0346 | 113.3 | 0.0361 |
| 2Q/86 | 114.7 | | 116.3 | |
| 3Q/87 | 116.6 | 0.0340 | 116.5 | 0.0361 |
| 3Q/87 | 116.7 | | 120.5 | |
| 3Q/88 | 124.9 | 0.0434 | 124.8 | 0.0361 |
| 4Q/88 | 129.2 | | 129.0 | |
| 4Q/89 | 131.4 | 0.0412 | 133.5 | 0.0361 |

ANNUAL FACTORS

| PERIOD | Change in GNPPI | g – factor |
|---|---|---|
| 2 | 3.612% | 5.161% |
| 3 | 3.612% | 5.161% |
| 4 | 3.612% | 5.161% |
| 5 | 3.612% | 5.161% |
| 6 | 3.612% | 5.161% |

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CHART PLX1

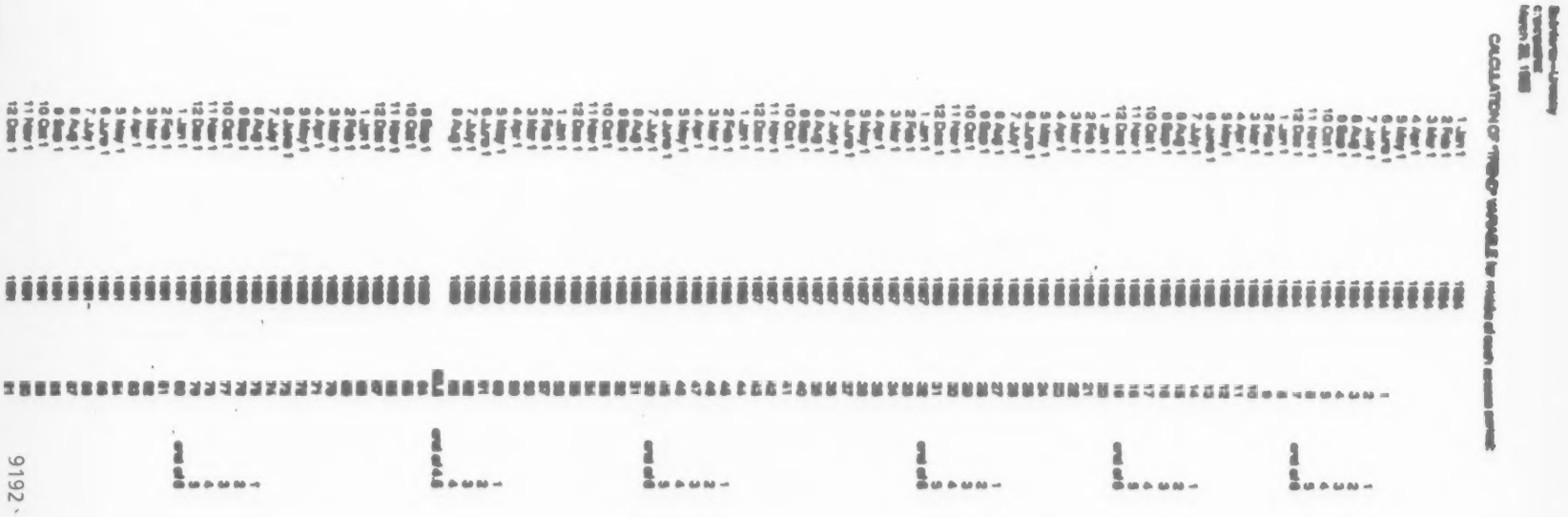
CHART PLX1

| | | Period 2 6/95 – 5/96 | Period 3 7/96 – 6/97 | Period 4 1998 | Period 5 4/99 – 12/99 | Period 6 7/00 – 6/01 |
|---|---|---|---|---|---|---|
| 1 CL X-FACTOR | 3.0% | | | | | |
| 2 Beginning CLMOU rate from trend | $0.03492 | | | | | |
| 3 Ending CLMOU Rate from trend | $0.02784 | | | | | |
| 4 Ending CLMOU Rate for Chosen X | $0.02784 | | | | | |
| 5 Delta for Ending CLMOU | $0.00000 | | | | | |
| 6 % Delta | 0.00% | | | | | |
| 7 | | | | | | |
| 8 PARAMETERS | | | | | | |
| 9 Growth in CLMOU | 8.5883% | | | | | |
| 10 Growth in Subscriber Lines | 3.2303% | | | | | |
| 11 Growth in MOU/Line: g-factor | 5.1912% | | | | | |
| 12 | | | | | | |
| 13 CALCULATIONS | | | | | | |
| 14 | | | | | | |
| 15 | | | | | | |
| 16 Step 1: Factors | | | | | | |
| 17 GNP-PI percent change | | 3.0% | 3.0% | 3.0% | 3.0% | 3.0% |
| 18 CL X-Factor | | 3.0% | 3.0% | 3.0% | 3.0% | 3.0% |
| 19 g-factor | | 5.19% | 5.19% | 5.19% | 5.19% | 5.19% |
| 20 Annuitization Factor | | 1.000 | 1.063 | 1.500 | 1.125 | 1.375 |
| 21 Step 2: Calculating CLMOU(t) from PCI | | | | | | |
| 22 CLMOU (t-1) | | NA | $0.034924 | $0.033277 | $0.031124 | $0.028662 |
| 23 PCI (t-1) | | NA | 100.00 | 95.28 | 89.12 | 84.76 |
| 24 1 + % Change in PCI | | NA | 95.28% | 93.53% | 95.11% | 94.95% |
| 25 PCI (t) | | 100.00 | 95.28 | 89.12 | 84.76 | 79.72 |
| 26 CLMOU (t) | | $0.034924 | $0.033277 | $0.031124 | $0.028662 | $0.027841 |
| 27 Step 3: Calc of SLCMOU(t) | | | | | | |
| 28 Monthly SLC | | $1.63 | $2.62 | $3.13 | $3.74 | $3.80 |
| 29 CLMOU per line per month | | 167.0 | 166.8 | 178.9 | 169.4 | 203.0 |
| 30 Lagged CLMOU/line/month * (1+g) | | 167.0 | 166.8 | 178.9 | 169.4 | 203.0 |
| 31 SLCMOU(t) | | $0.011941 | $0.015703 | $0.017478 | $0.018758 | $0.018730 |
| 32 Step 4: Calc CCL Rate | | $0.022983 | $0.017496 | $0.013646 | $0.009943 | $0.009111 |
| 33 | | | | | | |
| 34 | | | | | | |
| 35 CHART T8 | | | | | | |
| 36 | | | | | | |
| 37 T8 X-FACTOR | 5.0% | | | | | |
| 38 Beginning T8MOU rate from trend | $0.027977 | | | | | |
| 39 Ending T8MOU Rate from trend | $0.026012 | | | | | |
| 40 Ending T8MOU Rate for Chosen X | $0.026012 | | | | | |
| 41 Delta for Ending T8MOU | $0.000000 | | | | | |
| 42 % Delta | 0.00% | | | | | |
| 43 | | | | | | |
| 44 | | | | | | |
| 45 CALCULATIONS | | Period 2 6/95 – 5/96 | Period 3 7/96 – 6/97 | Period 4 1998 | Period 5 4/99 – 12/99 | Period 6 7/00 – 6/01 |
| 46 | | | | | | |
| 47 Step 1: Factors | | | | | | |
| 48 Annuitization Factor | | 1.000 | 1.063 | 1.500 | 1.125 | 1.375 |
| 49 GNP-PI Percentage Change | | 3.0% | 3.0% | 3.0% | 3.0% | 3.0% |
| 50 T8 X-Factor | | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| 51 Step 2: Calculate T8MOU | | | | | | |
| 52 T8MOU (t-1) | | NA | $0.027977 | $0.027548 | $0.026990 | $0.026529 |
| 53 PCI (t-1) | | NA | 100.00 | 95.48 | 89.37 | 84.83 |
| 54 1 + % Change in PCI | | NA | 95.48% | 93.57% | 95.01% | 94.94% |
| 55 PCI (t) | | 100.00 | 95.48 | 89.37 | 84.83 | 80.56 |
| | | $0.027977 | $0.027548 | $0.026990 | $0.026529 | $0.026012 |

CHART BFX1

| | | | | | | |
|---|---|---|---|---|---|---|
| 1 CL X-Factor | 5.0% | | | | | |
| 2 Begining CL/MOU rate from trend | $0.03482 | | | | | |
| 3 Ending CCL/MOU Rate from PLX1 | $0.00911 | | | | | |
| 4 Ending CCL/MOU rate for chosen X | $0.00911 | | | | | |
| 5 Delta for Ending CL/MOU | $0.00000 | | | | | |
| 6 % Delta | 0.00% | | | | | |
| 7 | | | | | | |
| 8 PARAMETERS | | | | | | |
| 9 Growth in CL MOU | 8.5883% | | | | | |
| 10 Growth in Subscriber Lines | 3.2303% | | | | | |
| 11 Growth in MOU/Line: g-factor | 5.1912% | | | | | |
| 12 | | | | | | |
| 13 CALCULATIONS | | | | | | |
| 14 | | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
| 15 | | 6/86 - 5/88 | 7/88 - 6/87 | 1988 | 4/89 - 12/89 | 7/90 - 6/91 |
| 16 Step 1: Factors | | | | | | |
| 17 GNP-PI percent change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 18 CL X-Factor | | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| 19 g-factor | | 5.19% | 5.19% | 5.19% | 5.19% | 5.19% |
| 20 Annualization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 21 Step 2: Calculating CL/MOU(t) from PCI | | | | | | |
| 22 CL/MOU (t-1) | | NA | $0.034824 | $0.033442 | $0.031484 | $0.030108 |
| 23 PCI (t-1) | | NA | 100.00 | 96.76 | 90.16 | 88.21 |
| 24 1 + % Change in PCI | | NA | 96.76% | 94.17% | 95.80% | 94.80% |
| 25 PCI (t) | | 100.00 | 96.76 | 90.16 | 88.21 | 81.58 |
| 26 CL/MOU (t) | | $0.034824 | $0.033442 | $0.031484 | $0.030108 | $0.028488 |
| 27 Step 3: Calc of SLC/MOU(t) | | | | | | |
| 28 Monthly SLC | | $1.83 | $2.82 | $3.13 | $3.74 | $3.80 |
| 29 CL MOU per line per month | | 157.0 | 195.8 | 178.9 | 188.4 | 203.0 |
| 30 Lagged CL MOU/line/month * (1 + g/2) | | 157.0 | 161.4 | 172.3 | 184.1 | 186.2 |
| 31 SLC/MOU(t) | | $0.011641 | $0.016226 | $0.018143 | $0.020322 | $0.018384 |
| 32 Step 4: Calc CCL Rate | | $0.023283 | $0.017217 | $0.013351 | $0.009788 | $0.009111 |
| 33 | | | | | | |
| 34 | | | | | | |
| 35 CHART TS | | | | | | |
| 36 | | | | | | |
| 37 TS X-FACTOR | 5.0% | | | | | |
| 38 Beginning TS/MOU rate from trend | $0.027977 | | | | | |
| 39 Ending TS/MOU Rate from trend | $0.026012 | | | | | |
| 40 Ending TS/MOU Rate for Chosen X | $0.026012 | | | | | |
| 41 Delta for Ending TS/MOU | $0.000000 | | | | | |
| 42 % Delta | 0.00% | | | | | |
| 43 | | | | | | |
| 44 | | | | | | |
| 45 CALCULATIONS | | Period 2 | Period 3 | Period 4 | Period 5 | Period 6 |
| 46 | | 6/86 - 5/88 | 7/88 - 6/87 | 1988 | 4/89 - 12/89 | 7/90 - 6/91 |
| 47 Step 1: Factors | | | | | | |
| 48 Annualization Factor | | 1.000 | 1.083 | 1.500 | 1.125 | 1.375 |
| 49 GNP-PI Percentage Change | | 3.6% | 3.6% | 3.6% | 3.6% | 3.6% |
| 50 TS X-Factor | | 5.0% | 5.0% | 5.0% | 5.0% | 5.0% |
| 51 Step 2: Calculate TS/MOU | | | | | | |
| 52 TS/MOU (t-1) | | NA | $0.027977 | $0.027548 | $0.026960 | $0.026529 |
| 53 PCI (t-1) | | NA | 100.00 | 96.46 | 96.37 | 94.83 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 51 | Step 2: Calculate TS/MOLI | | | | | |
| 52 | TS/MOLI (6 - 1) | NA | $0.027977 | $0.027546 | $0.026960 | $0.026529 |
| | | NA | 100.00 | 98.46 | 96.37 | 94.83 |



INPUT DATA FOR REGRESSION ANALYSIS FOR FREMTRUP - URETSKY STUDY
($000 MOU, tariff periods annualized)

| | A TREND | B Adj CL Rev | C Adj CL MOU | D CL/MOU | E Adj TS Rev | F TS MOU | G TS/MOU | H Tot Sw/MOU | I Adj CL MOU | J Sub Lines | K CL MOU/Line |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 6/84 - 5/85 | 7 | $69,333,273 | 207,772,422 | $0.003048 | $4,563,384 | 189,783,388 | $0.002438 | $0.0548 | 207,772,422 | 109,685,483 | 1.8894 |
| 6/85 - 5/86 | 19 | $7,141,822 | 216,343,084 | $0.003318 | $5,804,778 | 201,188,617 | $0.002788 | $0.0810 | 216,343,084 | 113,310,244 | 1.8994 |
| 7/86 - 6/87 | 32 | $8,048,472 | 224,828,813 | $0.003584 | $6,129,748 | 225,136,070 | $0.002723 | $0.0831 | 224,828,813 | 116,083,682 | 1.8964 |
| 1988 | 50 | $9,220,317 | 268,823,897 | $0.003092 | $7,229,663 | 283,972,545 | $0.002739 | $0.0563 | 268,823,897 | 121,854,374 | 2.1951 |
| 4/88 - 12/88 | 63.5 | $8,530,394 | 291,710,885 | $0.002924 | $8,001,639 | 295,351,330 | $0.002709 | $0.0563 | 291,710,885 | 139,432,081 | 2.3073 |
| 7/80 - 6/81 | 80 | $8,893,314 | 319,439,082 | $0.002775 | $8,353,350 | 327,897,299 | $0.002548 | $0.0532 | 319,439,082 | 133,039,705 | 2.4010 |

NOTE This data agrees with Chart RATE and Chart DATA in LEC Price Cap Order
SOURCES
Col A: Midpoint of tariff period, using June 1, 1984 as 1.
Cols B and C: Chart RATE, LEC Price Cap Order.
Col D: B/C
Cols E and F: Chart RATE, LEC Price Cap Order.
Col G: E/F
Col H: D+G
Cols I and J: Chart RATE, LEC Price Cap Order.
Col K: I/J

REGRESSION TREND FOR CL/MOU EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | CL/MOU | Ln(CL/MOU) | Estimated Ln(CL/MOU) | Estimated CL/MOU | Regression Output: | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | | Constant | | 0 |
| 1 | 19 | 0.003163481 | -5.760830888 | -5.754488073 | 0.003482401 | Std Err of Y Est | | 0.035281488 |
| 1 | 32 | 0.003638027 | -5.619962947 | -5.740288388 | 0.003277118 | R Squared | | 0.78873217 |
| 1 | 50 | 0.003923824 | -5.542228518 | -5.548708518 | 0.003112434 | No. of Observations | | 5 |
| 1 | 63.5 | 0.003235187 | -5.733238283 | -5.751888518 | 0.003060182 | Degrees of Freedom | | 3 |
| 1 | 80 | 0.002774482 | -5.889484585 | -5.861239408 | 0.002784132 | | | |
| | | | | | | X Coefficient(s) | -5.283988361 | -0.003715883 |
| | | | | | | Std Err of Coef. | 0.035818114 | 0.001008880 |
| | | | | | | t-value | -88.48384309 | -3.41886708 |
| | | | | | | Annual growth rate | | -4.37% |

REGRESSION TREND FOR TS/MOU EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | TS/MOU | Ln(TS/MOU) | Estimated Ln(TS/MOU) | Estimated TS/MOU | Regression Output: | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | | Constant | | 0 |
| 1 | 19 | 0.002788634 | -5.880882274 | -5.887037848 | 0.002787883 | Std Err of Y Est | | 0.028081844 |
| 1 | 32 | 0.002722885 | -5.903356168 | -5.898180074 | 0.002754882 | R Squared | | 0.72523774 |
| 1 | 50 | 0.002738752 | -5.897998788 | -5.901338911 | 0.002698021 | No. of Observations | | 5 |
| 1 | 63.5 | 0.002709183 | -5.908551880 | -5.903851238 | 0.002683012 | Degrees of Freedom | | 3 |
| 1 | 80 | 0.002647869 | -5.931003988 | -5.904021373 | 0.002681187 | | | |
| | | | | | | X Coefficient(s) | -5.886388209 | -0.001184082 |
| | | | | | | Std Err of Coef. | 0.002708867 | 0.000424332 |
| | | | | | | t-value | -188.5112473 | -2.813888830 |
| | | | | | | Annual growth rate | | -1.42% |

REGRESSION TREND FOR Tot SW/MOU EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | Tot SW/MOU | Ln(Tot SW/MOU) | Estimated Ln(Tot SW/MOU | Estimated Tot SW/MOU | Regression Output: | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | | Constant | | 0 |
| 1 | 19 | 0.063102161 | -2.760852401 | -2.760808874 | 0.063080888 | Std Err of Y Est | | 0.027977980 |
| 1 | 32 | 0.063008188 | -2.763833887 | -2.760888368 | 0.063065647 | R Squared | | 0.68780111 |
| 1 | 50 | 0.063031144 | -2.764166884 | -2.764520468 | 0.063012237 | No. of Observations | | 5 |
| 1 | 63.5 | 0.063032710 | -2.807857947 | -2.807888784 | 0.063015341 | Degrees of Freedom | | 3 |
| 1 | 80 | 0.063222202 | -2.803888304 | -2.802178888 | 0.063083736 | | | |
| | | | | | | X Coefficient(s) | -2.771788288 | -0.002662283 |
| | | | | | | Std Err of Coef. | 0.003888888 | 0.000857878 |

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| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1 | 63.5 | 0.03632710 | -2.87687947 | -2.82178868 | 0.03515341 | Degrees of Freedom | 3 |
| 1 | 80 | 0.03322302 | -2.93038304 | -2.82178868 | 0.03363736 | | |
| | | | | | | X Coefficient(s) | -2.71788280 -0.00256283 |
| | | | | | | Std Err of Coef. | 0.03080980 0.00057578 |

REGRESSION TREND FOR Tot CL MOU/LINE EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | Tot CL MOU/Line | Ln(CL MOU/Line) | Estimated Ln(CL MOU/Line | Estimated CL MOU/Line | Regression Output: | |
|---|---|---|---|---|---|---|---|
| | | | | | | Constant | 0 |
| 1 | 19 | 1.09837250 | 0.04204997 | 0.03314102 | 1.033517 | Std Err of Y Est | 0.02307249 |
| 1 | 32 | 1.05534737 | 0.03923711 | 0.03798842 | 1.039469 | R Squared | 0.99336787 |
| 1 | 50 | 2.10567447 | 0.76104991 | 0.76366329 | 2.146566 | No. of Observations | 5 |
| 1 | 63.5 | 2.39730178 | 0.89067575 | 0.92661044 | 2.272381 | Degrees of Freedom | 3 |
| 1 | 80 | 2.49168236 | 0.87914448 | 0.89048966 | 2.436134 | | |
| | | | | | | X Coefficient(s) | 0.95399967 0.09421749 |
| | | | | | | Std Err of Coef. | 0.02548814 0.00047462 |
| | | | | | | t-value | 21.76661857 0.03231569 |
| | | | | | | Annual growth rate | 9.16% |

NOTES:
This data agrees with Chart REG and Chart TREND in LEC Price Cap Order.
Constant toggle in LOTUS is set to zero in order to force LOTUS to compute
constant as coefficient of dummy variable. Otherwise, LOTUS will not output standard error associate with constant.
SOURCES:
Chart RATE and Chart DATA in LEC Price Cap Order

REGRESSION TREND FOR CL REV EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | CL Rev ($000) | Ln(CL Rev) | Estimated Ln(CL Rev) | Estimated CL Rev | Regression Output: | |
|---|---|---|---|---|---|---|---|
| | | | | | | Constant | 0 |
| 1 | 19 | $7,141,522 | 15.7814 | 15.8186 | $7,447,332 | Std Err of Y Est | 0.03328213 |
| 1 | 32 | $8,040,472 | 15.9811 | 15.8899 | $7,717,864 | R Squared | 0.97599952 |
| 1 | 50 | $8,220,317 | 15.9221 | 15.9157 | $8,187,466 | No. of Observations | 5 |
| 1 | 63.5 | $8,529,394 | 15.9569 | 15.9562 | $8,522,424 | Degrees of Freedom | 3 |
| 1 | 80 | $8,883,214 | 15.9974 | 16.0102 | $8,977,275 | | |
| | | | | | | X Coefficient(s) | 15.75610710 0.03515125 |
| | | | | | | Std Err of Coef. | 0.03663926 0.00066452 |
| | | | | | | t-value | 430.20510262 4.09301263 |
| | | | | | | Annual growth rate | 3.55% |

REGRESSION TREND FOR CL MOU EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | CL MOU (000 MOU) | Ln(CL MOU) | Estimated Ln(CL MOU) | Estimated CL MOU | Regression Output: | |
|---|---|---|---|---|---|---|---|
| | | | | | | Constant | 0 |
| 1 | 19 | 215,343,604 | 19.1877 | 19.1726 | 212,000,552 | Std Err of Y Est | 0.023635672 |
| 1 | 32 | 224,625,613 | 19.2290 | 19.2018 | 221,003,205 | R Squared | 0.995182916 |
| 1 | 50 | 265,023,667 | 19.3963 | 19.3954 | 262,414,187 | No. of Observations | 5 |
| 1 | 63.5 | 291,710,065 | 19.4913 | 19.4781 | 287,063,066 | Degrees of Freedom | 3 |
| 1 | 80 | 310,430,602 | 19.5521 | 19.5514 | 322,444,300 | | |
| | | | | | | X Coefficient(s) | 19.042000000 0.006000675 |
| | | | | | | Std Err of Coef. | 0.0260175415 0.000466267 |
| | | | | | | t-value | 731.60432000 14.12334000 |
| | | | | | | Annual growth rate | 6.568% |

REGRESSION TREND FOR LINES EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | Lines | Ln(Lines) | Estimated Ln(Lines) | Estimated Lines | Regression Output: | |
|---|---|---|---|---|---|---|---|
| | | | | | | Constant | 0 |
| 1 | 19 | 113,310,244 | 18.5457 | 18.5304 | 112,007,000 | Std Err of Y Est | 0.006030783 |
| 1 | 32 | 110,003,002 | 18.5000 | 18.5730 | 116,053,005 | R Squared | 0.993480712 |
| 1 | 50 | 121,054,376 | 18.6107 | 18.6210 | 122,240,000 | No. of Observations | 5 |
| 1 | 63.5 | 126,432,661 | 18.6552 | 18.6573 | 126,000,156 | Degrees of Freedom | 3 |
| 1 | 80 | 130,000,705 | 18.7000 | 18.7010 | 132,350,005 | | |
| | | | | | | X Coefficient(s) | 18.480002302 0.007640303 |
| | | | | | | Std Err of Coef. | 0.0060412005 0.00012411 |
| | | | | | | t-value | 3109.66150004 61.54700327 |

## REGRESSION TREND FOR TS REV EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | TS Rev | Ln TS Rev | Estimated Ln TS Rev | Estimated TS Rev |
|---|---|---|---|---|---|
| 1 | 19 | $5,604,779 | 15.53913018 | 15.55160321 | $5,675,125 |
| 1 | 32 | $6,129,746 | 15.62666367 | 15.64175944 | $6,210,546 |
| 1 | 50 | $7,229,553 | 15.79366777 | 15.76659115 | $7,036,267 |
| 1 | 63.5 | $8,001,639 | 15.89515695 | 15.86021492 | $7,726,874 |
| 1 | 80 | $8,353,366 | 15.93817393 | 15.97464398 | $8,663,627 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.03470018 |
| R Squared | | 0.969171817 |
| No. of Observations | | 5 |
| Degrees of Freedom | | 3 |
| X Coefficient(s) | 15.419836415 | 0.008635095 |
| Std Err of Coef. | 0.0382129128 | 0.00071411 |
| t-value | 403.52423669 | 9.711516473 |
| Inst. annual growth rate | | 8.6470% |

## REGRESSION TREND FOR TS MOU EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | TS MOU | Ln TS MOU | Estimated Ln TS MOU | Estimated TS MOU |
|---|---|---|---|---|---|
| 1 | 19 | 201,186,517 | 19.11975292 | 19.12796169 | 202,950,880 |
| 1 | 32 | 225,136,070 | 19.23221553 | 19.23366018 | 225,461,548 |
| 1 | 50 | 263,972,545 | 19.39135566 | 19.37999426 | 260,987,809 |
| 1 | 63.5 | 295,351,330 | 19.50367615 | 19.48972731 | 291,260,121 |
| 1 | 80 | 327,897,259 | 19.60821086 | 19.62366771 | 333,066,160 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.01458663 |
| R Squared | | 0.995924609 |
| No. of Observations | | 5 |
| Degrees of Freedom | | 3 |
| X Coefficient(s) | 18.9735265 | 0.008129115 |
| Std Err of Coef. | 0.0160656713 | 0.00030023 |
| t-value | 1180.9981764 | 27.07629267 |
| Inst. annual growth rate | | 10.2031% |

## REGRESSION TREND FOR GNP-PI EXCLUDING FIRST DATA POINT

| Intercept Dummy | TREND | GNP-PI | Ln GNP-PI | Estimated Ln GNP-PI | Estimated GNP-PI |
|---|---|---|---|---|---|
| 1 | 6.5 | 110 | 4.70048037 | 4.69427343 | 109.3 |
| 1 | 18.5 | 113.8 | 4.73444252 | 4.72976772 | 113.3 |
| 1 | 24.5 | 114.7 | 4.74232002 | 4.74749987 | 115.3 |
| 1 | 36.5 | 118.8 | 4.77575649 | 4.78299417 | 119.5 |
| 1 | 39.5 | 119.7 | 4.78496861 | 4.79165524 | 120.5 |
| 1 | 51.5 | 124.9 | 4.82751342 | 4.82733954 | 124.9 |
| 1 | 54.5 | 126.2 | 4.83786795 | 4.83621061 | 126.0 |
| 1 | 66.5 | 131.4 | 4.87824611 | 4.87169491 | 130.5 |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.006223469 |
| R Squared | | 0.99086643 |
| No. of Observations | | 8 |
| Degrees of Freedom | | 6 |
| X Coefficient(s) | 4.6750527665 | 0.002957025 |
| Std Err of Coef. | 0.0048676301 | 0.000117164 |

## TREND LINE ESTIMATES

| TREND | CL/MOU | TS/MOU | Tot SW/MOU | CL MOU/Line | CL Rev | CL MOU | Sub Lines | TS Rev | TS MOU |
|---|---|---|---|---|---|---|---|---|---|
| 19 | $0.034924 | $0.027977 | $0.062909 | 1.883517 | $7,407,332 | 212,096,552 | 112,607,690 | $5,675,125 | 202,950,880 |
| 32 | $0.033277 | $0.027546 | $0.060855 | 1.969669 | $7,717,084 | 231,903,265 | 116,553,665 | $6,210,546 | 225,461,548 |
| 50 | $0.031124 | $0.026980 | $0.058122 | 2.146596 | $8,167,468 | 262,414,197 | 122,246,668 | $7,036,267 | 260,987,809 |
| 63.5 | $0.029602 | $0.026529 | $0.056153 | 2.27236 | $8,522,424 | 287,903,966 | 126,698,156 | $7,7[illegible]74 | 291,260,121 |
| 80 | $0.027841 | $0.026012 | $0.053837 | 2.43612[illegible] | $8,977,275 | 322,444,300 | 132,359,585 | $8,6[illegible]27 | 333,066,160 |

# APPENDIX E

## EVALUATION OF THE USTA UPDATE OF THE FRENTRUP-URETSKY STUDY

by Alexander Belinfante[1]

## I. INTRODUCTION AND BACKGROUND

As part of the Order establishing price caps for the LECs,[2] the Commission relied upon a short-run study (Frentrup-Uretsky study) of switched access productivity for the local exchange carriers.[3] As part of the record in this proceeding, USTA filed an update of that study.[4] This update restates the historical data used in the original study, and replaces the last data point, which consisted of projected data for 1990/91, with three new data points for 1990, 1991, and 1992. The update purports to show that the unitary balanced 50/50 X-Factor, which was estimated as 3.5% in the original study, declined to 2.7% over the extended period.

This appendix evaluates that update and compares the estimation techniques used with those of our own revised version of the Frentrup-Uretsky study.[5] Our analysis shows that the USTA study contains several flaws and discrepancies from the methodology used in our study. If the methodology used in the revised version of our study is used with the USTA data, the estimated unitary balanced 50/50 X-Factor is 3.3%, not 2.7%. This compares with our revised estimate of 3.4% based on the original data set, including the 1984/85 data point, indicating that there has been at best a very small change in the X-Factor as a result of the additional data. We have not, however, examined the accuracy of USTA's newly provided 1990-92 data or its restatement of the 1984-89 data.

The table in Attachment A summarizes the X-Factors from the USTA study as compared with our revised estimates of the X-Factors using both the USTA data set and the

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1 Mr. Belinfante is Senior Economist, Common Carrier Bureau, Federal Communications Commission.

2 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (Second Report and Order).

3 Appendix C, "A Study of Local Exchange Carrier Post-Divestiture Switched Access Productivity," by J. Christopher Frentrup and Mark I. Uretsky, 5 FCC Rcd 6885. This is referred to hereafter as the Frentrup-Uretsky study.

4 National Economic Research Associates, Inc., "An Update of the FCC Short-Term Productivity Study for Local Exchange Carriers: 1984-1992", prepared for United States Telephone Association, September 1994.

5 See Appendix D. That appendix discusses the reasons for some changes in methodologies between the Frentrup-Uretsky study and our revised study.

original Frentrup-Uretsky data set for various time periods. The top part of the table shows estimates using various methodologies with the full USTA data set. It shows that most of the differences between their estimate and ours are due to six differences in methodology. Each column adjusts for one more of the six differences in methodology than the preceding column. The column labeled "Fully Corrected" uses the same methodology as our revised study. The bottom part of the table shows the impact of the period selected for analysis as well as the differences in the data sets. Attachment B contains the spreadsheet provided to us by USTA, modified to reflect the calculations required by the methodology of our revised study.

## II. METHODOLOGICAL DIFFERENCES

The most significant difference is in the calculation of the common line minutes of use per line growth factor, which is the "g-factor" in the common line PCI formula. The original Frentrup-Uretsky study and our update of that study both use adjusted minutes to calculate g. (The adjustments are for the impacts of exogenous changes.) On the other hand, the USTA study calculates the g factor based on unadjusted minutes. Consequently, the g-factor estimated in the USTA study is 6.19%, as compared to 4.04% using the adjusted minutes. Using unadjusted minutes instead of adjusted minutes has the effect of reducing the common line balanced 50/50 X-Factor by more than 1% and the common line per line X-Factor by over 2%. If the adjusted minutes are used, the unitary balanced 50/50 X-Factor becomes 3.3%, which is virtually the same as that derived using our methodology. This indicates that the combined effect of all of the other differences in methodology is small. Because the rates that are being used to determine the X-Factor are based on the adjusted minutes, it is appropriate to use those adjusted minutes to determine the g-factor.

One difference between the USTA study and the Frentrup-Uretsky study is the use of a trend value of g in the USTA study versus individual annual g values that were used in the Frentrup-Uretsky study. In our revised study, we also used a trend value for g. However, we used the exact formula $e^{12b}-1$, where b is the monthly regression slope of the natural logarithms on time, instead of the approximate formula $(1+b)^{12}-1$ used in the USTA study.[6] This is the smallest discrepancy between the two studies. This approximation has a negligible effect on the X-Factor.[7]

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6 Use of the exact formula is equivalent to calculating the percentage change of two points of the trended variable that are spaced exactly one year apart.

7 Carried out to a second decimal place the effect is 0.01%. However, use of the trend value for g, used in both the USTA study and our revised study, does cause the X-Factor to be somewhat lower than the estimate from the Frentrup-Uretsky study, which uses individual annual values for g.

Another computational discrepancy is the failure of the USTA study to use annualization factors to account for the differences in the time spacing between the periods used in the studies. These factors are used in both the original Frentrup-Uretsky study and in our revised study. Correcting this omission slightly increases the traffic sensitive X-Factor, decreases the common line X-Factor, and slightly decreases the unitary X.

Both the USTA study and our revised study use different estimates of the change in GNP-PI from those used in the Frentrup-Uretsky study. The Frentrup-Uretsky study used individual annual values for the change in GNP-PI. The USTA study uses the average value of the changes in GNP-PI observed for use in the 8 periods in the study. Our revised study instead computes a trend line of the GNP-PI values[8] at the end points of the time intervals used to calculate the changes, and determines the average annual change in GNP-PI from the slope of the regression line. This has the advantage of taking into account the changes in GNP-PI in the intervals between the periods used in the study.[9] Our revised method results in a somewhat lower estimate of X than would result from the methodology of either the USTA study or the Frentrup-Uretsky study.

The next difference between the USTA study and our revised study is that the common line X-Factor is calculated from the total CL rate in the USTA study, but it is calculated from the CCL rate in our revised study. This difference has no impact on the per line X-Factors, but it does affect the balanced 50-50 common line X-Factor. Our estimate is somewhat lower than what it would have been if USTA's methodology were used.

The final difference in methodologies is in the computation of the unitary X-Factors. The USTA study appears to follow the methodology of the Frentrup-Uretsky study of finding the X-Factor that would equate a weighted average of the percentage changes in the PCIs using the unitary X-Factor with a weighted average of the percentage changes in the PCIs using the individual X-Factors. Our revised approach is to choose a unitary X-Factor which will result in the same total revenue from both the common line and traffic sensitive baskets that would result from using the individual X-Factors. It thus has the advantage of being revenue neutral. Our revised approach has the effect of increasing the unitary X-Factors somewhat.

## III. DATA SET AND TIME PERIOD DIFFERENCES

A comparison of the estimated X-Factors using our revised methodology with the USTA data set for 1984-92 and the original Frentrup-Uretsky data set for 1984-91 shows that the USTA data set yields slightly lower estimated values for X. The source of this difference

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8 For the earliest and latest periods, where GNP-PI is reported using a different base, the index values were converted to the base used for the remaining observations.

9 Our method has a slight disadvantage of not weighting all 8 periods in the study equally, because 3 of the end points of the periods coincide, resulting in 13 observations instead of 16.

was investigated by looking at the effect of using different time periods from the two data sets. The last year of the Frentrup-Uretsky study consisted of projected data for the 1990/91 tariff year. This was replaced by actual data for the calendar years 1990, 1991, and 1992 in the USTA study. By removing the data beginning in 1990 and concentrating on the period the two studies have in common, 1984-89, we can see the impact of USTA's revisions to the historical data. This removal results in the estimates from the Frentrup-Uretsky data going down slightly and the estimates from the USTA study going up slightly. The net effect is that the estimates from the USTA data set are slightly higher than those from the Frentrup-Uretsky data set for 1984-89.

A remaining question is the impact of the 1984/85 data point. As noted in Appendix D, removal of that data point results in a significant increase in the X-Factor as estimated from the Frentrup-Uretsky data set. Removal of that data point also results in a significant, but not quite as large, increase in the X-Factor as estimated from the USTA data set. Further evidence that the 1984/85 data point is an outlier can be seen in the charts in Attachment C, which show trend estimates of total adjusted switched access rates, using USTA's data, first including and then excluding the 1984/85 data point. The trend line is clearly a better fit when the 1984/85 data point is excluded.

Belinfante-Uretsky
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March 29, 1995

Attachment A

# Correcting X-Factors for USTA Update of FCC Short-Term Study

Including all years of USTA study (1984-92)

| | As Reported by USTA | Calculate g from Adjusted MOU | Correct Formula for g | Annualization Factors Used | Use Trend for GNP-PI | Base Common Line X on CCL | Fully Corrected Base Unitary X on Revenues |
|---|---|---|---|---|---|---|---|
| Unitary Balanced 50/50 | 2.7% | 3.3% | 3.3% | 3.3% | 3.0% | 3.0% | 3.3% |
| Unitary Per Line | 1.6% | 2.7% | 2.7% | 2.7% | 2.4% | 2.4% | 2.3% |
| Common Line - Balanced 50/50 | 3.0% | 4.0% | 4.0% | 3.9% | 3.6% | 3.4% | 3.4% |
| Common Line - Per Line | -0.1% | 2.0% | 2.0% | 1.9% | 1.6% | 1.6% | 1.6% |
| Traffic Sensitive | 3.4% | 3.4% | 3.4% | 3.5% | 3.2% | 3.2% | 3.2% |

Different time periods and/or data using our revised methodology

| | Frentrup-Uretsky Data 1984-91 | Frentrup-Uretsky Data 1984-89 | USTA Data 1984-89 | USTA Data 1985-92 | Frentrup-Uretsky Data 1985-91 |
|---|---|---|---|---|---|
| Unitary Balanced 50/50 | 3.4% | 3.3% | 3.4% | 4.6% | 5.0% |
| Unitary Per Line | 2.5% | 2.3% | 2.4% | 3.5% | 4.0% |
| Common Line - Balanced 50/50 | 3.5% | 3.3% | 3.4% | 4.3% | 5.0% |
| Common Line - Per Line | 1.6% | 1.4% | 1.5% | 2.5% | 3.0% |
| Traffic Sensitive | 3.4% | 3.2% | 3.3% | 5.0% | 5.0% |

9200

# WORKPAPERS

Beinfante
c:\pc\pathue
March 29, 1995

using total revenue to calculate unitary X's
using ccl rate for common line X
using annualization factors
using trended gnppi
using corrected formula for g
using adjusted instead of unadj. CL minutes

| | | |
|---|---|---|
| g = | 4.04% | based on adj. CL minutes |
| gnppi = | 3.78% | |
| alpha (% sic) = | 65.71% | based on unadj. rev. |

LEC 8 PERIOD ANALYSIS

INDIVX

| | CL | TS | |
|---|---|---|---|
| Per Line X = | 1.6% | 3.2% | back−solve for 4 Xs based on fitted values from regressions |
| Compromise X = | 3.4% | 3.2% | (formula cells = M37,M44,Q37) (b23,b24,c23,c24) |

9202

| | CL PCI | % change CCL | % change TS | % change TotSw | |
|---|---|---|---|---|---|
| Per Line | 98.22% | 2.24% | 0.58% | 0.68% | weighted average of CCL and TS % changes based on unadj. rev. |

difference in ending rate from target

| | | |
|---|---|---|
| | 7.30098E−16 | −3.63886E−13 |
| UNITARYX | −3.62766E−13 | −3.63886E−13 |

UNITARYX

| | | |
|---|---|---|
| Per Line X = | 2.3% | back−solve for X based on total revenues |
| Compromise X = | 3.3% | back−solve for X based on total revenues (formula cells = b49, c49) |

| | % change CCL | % change TS | % change TotSw | |
|---|---|---|---|---|
| Compromise | −0.68% | 0.46% | 0.16% | weighted average of CCL and TS % changes |
| | | | −0.00518793 | |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| −3.24171494 | 7 | 1 | | −3.84922777 | 7 | 1 | |
| −3.14854173 | 19 | 1 | 8 PERIOD | −3.64232521 | 19 | 1 | 8 PERIOD |
| −3.08309913 | 32 | 1 | CL RATE/MOU | −3.65909549 | 32 | 1 | TS RATE/MOU |
| −3.22700390 | 50 | 1 | REGRESSION | −3.63928775 | 50 | 1 | REGRESSION |
| −3.26324216 | 63.5 | 1 | ---------- | −3.64191485 | 63.5 | 1 | ---------- |
| −3.30844333 | 74 | 1 | | −3.68472541 | 74 | 1 | |
| −3.27303985 | 86 | 1 | | −3.67585253 | 86 | 1 | |
| −3.28128440 | 98 | 1 | | −3.74455043 | 98 | 1 | |

Regression Output:

| | | | |
|---|---|---|---|
| Constant | | 0 | Constant |
| Std Err of Y Est | | 0.0626 | Std Err of Y Est |
| R Squared | | 0.4132 | R Squared |
| No. of Observations | | 8 | No. of Observations |
| Degrees of Freedom | | 6 | Degrees of Freedom |
| | beta | alpha | |
| X Coefficient(s) | −0.0015 | −3.1479 | X Coefficient(s) |
| Std Err of Coef. | 0.0007 | 0.0449 | Std Err of Coef. |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.0763 |
| R Squared | | 0.0464 |
| No. of Observations | | 8 |
| Degrees of Freedom | | 6 |
| X Coefficient(s) | 0.0005 | −3.7179 |
| Std Err of Coef. | 0.0009 | 0.0548 |

9203

| | | | | | |
|---|---|---|---|---|---|
| | | | | 0.02436717541 | |
| | | | | 0.02545442147 | |
| | | | | 0.58% | |
| | beginning trend | 0.0424949111 | | | |
| | ending trend | 0.0370804907 | <===TARGET | | |
| | growth rate | −1.78% | | | |
| | | indiv | | unitary | |
| | | 1 | 0.0425 <== Beg Rate | 0.0425 | 1 |
| | Per Line | 2 | 0.0417 Per Line | 0.0415 | 2 |
| | | 3 | 0.0409 | 0.0404 | 3 |
| | | 4 | 0.0398 | 0.0389 | 4 |
| | | 5 | 0.0390 | 0.0378 | 5 |
| | | 6 | 0.0384 | 0.0370 | 6 |
| | | 7 | 0.0378 | 0.0361 | 7 |
| | | 8 | 0.0371 <== End Rate | 0.0353 | 8 |
| | Bal. 50/50 | 2 | 0.0418 Bal. 50/50 | 0.0418 | 2 |
| | Compromise | 3 | 0.0411 | 0.0411 | 3 |
| | | 4 | 0.0401 | 0.0402 | 4 |
| | | 5 | 0.0394 | 0.0395 | 5 |
| | | 6 | 0.0388 | 0.0390 | 6 |
| | | 7 | 0.0382 | 0.0384 | 7 |
| | | 8 | 0.0376 | 0.0378 | 8 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| −2.80688266 | 7 | 1 | | 18.84356038 | 7 | 1 | |
| −2.67211322 | 19 | 1 | 8 PERIOD | 18.87110574 | 19 | 1 | 8 PERIOD |
| −2.63703958 | 32 | 1 | TOTAL SW/MOU | 18.92439828 | 32 | 1 | CL MOU |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | 6 | 0.0388 | | 0.0390 | 6 |
| | | | 7 | 0.0382 | | 0.0384 | 7 |
| | | | 8 | 0.0376 | | 0.0378 | 8 |
| −2.80688266 | 7 | 1 | | 18.84356038 | 7 | 1 | |
| −2.67211322 | 19 | 1 | 8 PERIOD | 18.87110574 | 19 | 1 | 8 PERIOD |
| −2.63703958 | 32 | 1 | TOTAL SW/MOU | 18.92439838 | 32 | 1 | CL MOU |
| −2.71890020 | 50 | 1 | REGRESSION | 19.08892351 | 50 | 1 | REGRESSION |
| −2.74161328 | 63.5 | 1 | ---------- | 19.17276960 | 63.5 | 1 | ---------- |
| −2.78584210 | 74 | 1 | | 19.23756254 | 74 | 1 | |
| −2.76115241 | 86 | 1 | | 19.26786217 | 86 | 1 | |
| −2.79317982 | 98 | 1 | | 19.33420795 | 98 | 1 | |

Regression Output:

| | |
|---|---|
| Constant | |
| Std Err of Y Est | |
| R Squared | |
| No. of Observations | |
| Degrees of Freedom | |
| X Coefficient(s) | −0.0007 |
| Std Err of Coef. | 0.0007 |
| | 0.0669 |
| | 0.0625 |
| | −0.90% |
| | 0.0338328916 |
| | 0.0124395468 |
| | 0.0119518928 |

Regression Output:

| | |
|---|---|
| 0 | Constant |
| 0.0597 | Std Err of Y Est |
| 0.1624 | R Squared |
| 8 | No. of Observations |
| 6 | Degrees of Freedom |
| −2.6994 | X Coefficient(s) |
| 0.0428 | Std Err of Coef. |

| | |
|---|---|
| 0 | |
| 0.02784650 | |
| 0.98182011 | |
| 8 | |
| 6 | |
| 0.0058335963 | 18.779357582 |
| 0.0003240712 | 0.019990966 |
| 149109688.26 | |
| 253544528.42 | |
| 7.23% | 7.25% |

9204

| indiv | unitary |
|---|---|
| 0.0244 | 0.0244 |
| 0.0245 | 0.0247 |
| 0.0247 | 0.0251 |
| 0.0249 | 0.0257 |
| 0.0250 | 0.0261 |
| 0.0252 | 0.0265 |
| 0.0253 | 0.0269 |
| 0.0255 | 0.0273 |
| 0.0245 | 0.0245 |
| 0.0247 | 0.0246 |
| 0.0249 | 0.0248 |
| 0.0250 | 0.0249 |
| 0.0252 | 0.0250 |
| 0.0253 | 0.0251 |
| 0.0255 | 0.0252 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 18.51567708 | 7 | 1 | | 0.32788330 | 7 | 1 | |
| 18.54569309 | 19 | 1 | 8 PERIOD | 0.32541266 | 19 | 1 | 8 PERIOD |
| 18.56964941 | 32 | 1 | LINES | 0.35474897 | 32 | 1 | ADJMOU/LNS |
| 18.61669458 | 50 | 1 | REGRESSION | 0.47222893 | 50 | 1 | REGRESSION |
| 18.64858065 | 63.5 | 1 | ---------- | 0.52418895 | 63.5 | 1 | ---------- |
| 18.69192902 | 74 | 1 | | 0.54563352 | 74 | 1 | |
| 18.71591324 | 86 | 1 | | 0.55194894 | 86 | 1 | |
| 18.74011062 | 98 | 1 | | 0.59409732 | 98 | 1 | |

Regression Output:

| | | | |
|---|---|---|---|
| Constant | | 0 Constant | |
| Std Err of Y Est | | 0.00633965 Std Err of Y Est | |
| R Squared | | 0.99494241 R Squared | |
| No. of Observations | | 8 No. of Observations | |
| Degrees of Freedom | | 6 Degrees of Freedom | |
| X Coefficient(s) | 0.0025347664 | 18.494445689 X Coefficient(s) | |
| Std Err of Coef. | 0.0000737794 | 0.0045512258 Std Err of Coef. | |
| | 109582588.35 | | |
| | 138012221.28 | | |
| | 3.08% | 3.09% | |

Regression Output:

| | | |
|---|---|---|
| | | 0 |
| | | 0.0268 |
| | | 0.9492 |
| | | 8 |
| | | 6 |
| | 0.0033 | 0.2849 |
| | 0.0003 | 0.0192 |
| | 1.3607060256 | |
| | 1.84 | |
| | 4.03% | |
| | 4.04% | |

9205

| slc/mou (per line) | ccl rate (per line) | unitary ccl rate |
|---|---|---|
| $0.0087 | $0.0338 | $0.0338 |
| $0.0155 | $0.0262 | $0.0260 |
| $0.0213 | $0.0197 | $0.0191 |
| $0.0239 | $0.0159 | $0.0150 |
| $0.0277 | $0.0113 | $0.0101 |
| $0.0266 | $0.0118 | $0.0104 |
| $0.0256 | $0.0122 | $0.0106 |
| $0.0246 | $0.0124 | $0.0106 |
| $0.0158 | $0.0260 | $0.0260 |
| $0.0217 | $0.0194 | $0.0194 |
| $0.0246 | $0.0155 | $0.0156 |
| $0.0283 | $0.0111 | $0.0112 |
| $0.0271 | $0.0117 | $0.0119 |
| $0.0261 | $0.0121 | $0.0123 |
| $0.0251 | $0.0124 | $0.0127 |

| trend cl mou/line | grow at g | grow at g/2 |
|---|---|---|
| 1.3607060256 | 1.3607060256 | 1.3607060256 |
| 1.4156512324 | 1.4156512324 | 1.388178629 |
| 1.4776817116 | 1.4776817116 | 1.4466408952 |
| 1.5680822666 | 1.5680822666 | 1.5226583471 |
| 1.6394938889 | 1.6394938889 | 1.6037439106 |
| 1.6972771723 | 1.6972771723 | 1.6684212691 |
| 1.7658130966 | 1.7658130966 | 1.7315451344 |
| 1.8371164964 | 1.8371164964 | 1.8014647965 |

| | | | |
|---|---|---|---|
| 18.983854765 | 7 | 1 | |
| 19.014130002 | 19 | 1 | 8 PERIOD |

| | | |
|---|---|---|
| $0.0271 | $0.0117 | $0.0119 |
| $0.0261 | $0.0121 | $0.0123 |
| $0.0251 | $0.0124 | $0.0127 |

| | | | |
|---|---|---|---|
| 18.983854765 | 7 | 1 | |
| 19.014130002 | 19 | 1 | 8 PERIOD |
| 19.056162757 | 32 | 1 | TS MOU |
| 19.176045827 | 50 | 1 | REGRESSION |
| 19.228182476 | 63.5 | 1 | ---------- |
| 19.261286722 | 74 | 1 | |
| 19.278169324 | 86 | 1 | |
| 19.333764956 | 98 | 1 | |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.0201637748 |
| R Squared | | 0.9800171722 |
| No. of Observations | | 8 |
| Degrees of Freedom | | 6 |
| X Coefficient(s) | 0.0040253682 | 18.950337648 |
| Std Err of Coef. | 0.0002346614 | 0.0144755475 |

251970791.68

9206

| end period Revenues | per line | balanced 50/50 |
|---|---|---|
| Individual X's | | |
| SLC | $6,247,576 | $6,247,576 |
| CCL | $3,153,979 | $3,153,979 |
| CL | $9,401,556 | $9,401,556 |
| TS | $6,413,771 | $6,413,771 |
| total | $15,815,326 | $15,815,326 |
| Unitary X's | | |
| SLC | $6,247,576 | $6,247,576 |
| CCL | $2,690,805 | $3,212,527 |
| CL | $8,938,382 | $9,460,104 |
| TS | $6,876,944 | $6,355,223 |
| total | $15,815,326 | $15,815,326 |
| difference | $0 | $0 |

9207

| slc rev/line | period | cl rate | ts rate | totsw rate | cl unadj mou | lines | cl unadj rev |
|---|---|---|---|---|---|---|---|
| $0.0118 | 1 | $0.0391 | $0.0213 | $0.0604 | 183,602,357 | 109,965,483 | $10,172,842 |
| $0.0219 | 2 | $0.0429 | $0.0262 | $0.0691 | 199,946,832 | 113,316,244 | $10,878,568 |
| $0.0314 | 3 | $0.0458 | $0.0258 | $0.0716 | 198,878,262 | 116,063,662 | $10,213,735 |
| $0.0375 | 4 | $0.0397 | $0.0263 | $0.0659 | 244,467,327 | 121,654,374 | $10,012,595 |
| $0.0454 | 5 | $0.0383 | $0.0262 | $0.0645 | 279,513,375 | 125,595,961 | $9,807,040 |
| $0.0452 | 6 | $0.0366 | $0.0251 | $0.0617 | 305,839,946 | 131,160,067 | $9,568,617 |
| $0.0451 | 7 | $0.0379 | $0.0253 | $0.0632 | 326,675,691 | 134,343,866 | $9,395,161 |
| $0.0453 | 8 | $0.0376 | $0.0236 | $0.0612 | 349,305,191 | 137,634,286 | $9,481,498 |
| | | −1.33% | 3.34% | | | | |
| | | −0.56% | −0.67% | | | | |

| Adj TS MOU | | Adjst MOU | Adjst MOU/Lines | g | Cumulative Average | |
|---|---|---|---|---|---|---|
| 175,623,800 | Subtract | 152,635,057 | 1.3880 | | | |
| 181,022,158 | WATS DA | 156,897,886 | 1.3846 | −0.25% | | |
| 186,793,193 | | 165,486,202 | 1.4258 | 2.98% | 1.37% | |
| 212,836,842 | | 195,080,628 | 1.6036 | 12.47% | 5.07% | |
| 224,229,912 | | 212,142,675 | 1.6891 | 5.33% | 5.13% | |
| 231,777,107 | | 226,343,098 | 1.7257 | 2.17% | 4.54% | 6 Period Avg |
| 235,723,325 | | 233,306,168 | 1.7366 | 0.63% | 3.69% | |
| 249,199,654 | | 249,310,072 | 1.8114 | 4.30% | 3.95% | 6 Period Avg |

| sic rev ts | unadj rev | gnp–pi | GNP–PI*** START QUARTEF | GNP–PI*** END QUARTER | | analysis period | data source period | | mid–month |
|---|---|---|---|---|---|---|---|---|---|
| $1,296,104 | $5,461,496 | 4.0695% | 218.7 | 227.6 | 1 = | 6/84 – 5/85 | 82/4 | 83/4 | 7 |
| $2,484,658 | $6,562,000 | 4.1740% | 227.6 | 237.1 | 2 = | 6/85 – 5/86 | 83/4 | 84/4 | 19 |
| $3,646,949 | $7,102,456 | 3.4545% | 110 | 113.8 | 3 = | 7/86 – 6/87 | 84/4 | 85/4 | 32 |
| $4,563,679 | $8,231,744 | 3.4002% | 114.7 | 118.6 | 4 = | 1988 | 86/2 | 87/2 | 50 |
| $5,703,289 | $8,637,220 | 4.3442% | 119.7 | 124.9 | 5 = | 4/89 –12/89 | 87/3 | 88/3 | 63.5 |
| $5,926,881 | $8,492,946 | 4.8662% | 123.3 | 129.3 | 6 = | 1990 | 88/2 | 89/2 | 74 |
| $6,062,676 | $8,609,845 | 4.8018% | 131.2 | 137.5 | 7 = | 1991 | 89/4 | 90/4 | 86 |
| $6,230,468 | $9,054,015 | 3.3972% | 114.8 | 118.7 | 8 = | 1992 | 90/4 | 91/4 | 98 |
| | | 4.0628% | | | | | | | |

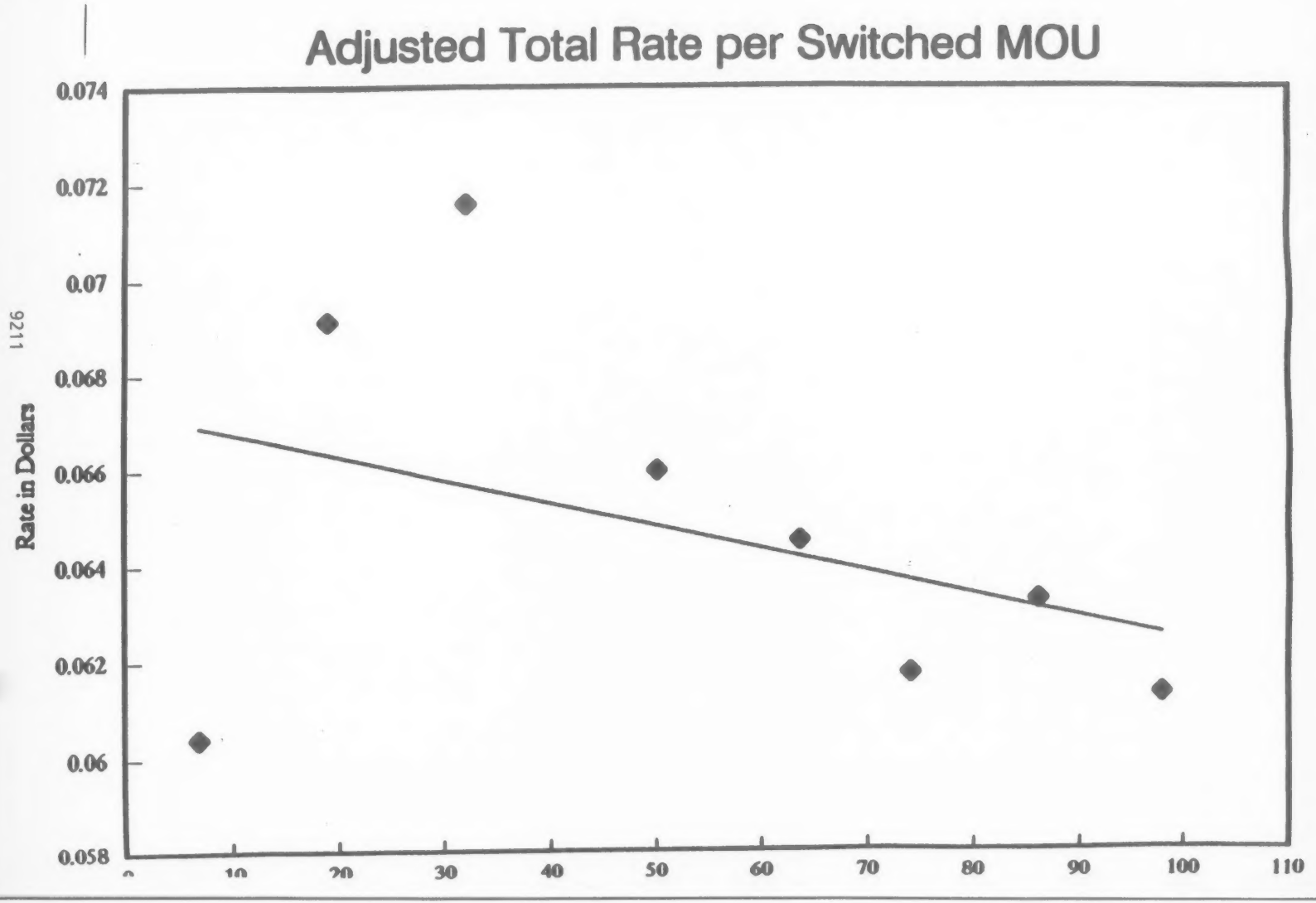
| mid–month | change from previous period | annualization factor |
|---|---|---|
| 7 | | |
| 19 | 12 | 1 |
| 32 | 13 | 1.0833333333 |
| 50 | 18 | 1.5 |
| 63.5 | 13.5 | 1.125 |
| 74 | 10.5 | 0.875 |
| 86 | 12 | 1 |
| 98 | 12 | 1 |

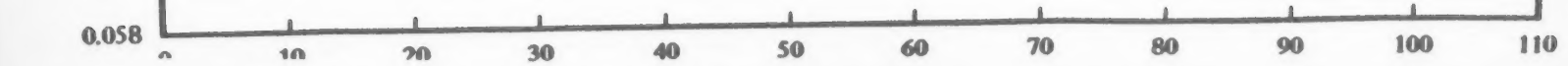
| | | | | |
|---|---|---|---|---|
| 101.5 | 4.6196993004 | −17.5 | 1 | |
| 105.6 | 4.659588075 | −5.5 | 1 | |
| 110.0 | 4.7004803658 | 6.5 | 1 | |
| 113.8 | 4.7344425217 | 18.5 | 1 | |
| 114.7 | 4.7423200241 | 24.5 | 1 | |
| 118.6 | 4.7757564866 | 36.5 | 1 | |
| 119.7 | 4.7849886126 | 39.5 | 1 | 13 PERIOD |
| 123.3 | 4.8146204102 | 48.5 | 1 | GNPPI |
| 124.9 | 4.8275134171 | 51.5 | 1 | REGRESSION |
| 129.3 | 4.8621352858 | 60.5 | 1 | ---------- |
| 131.2 | 4.8767228765 | 66.5 | 1 | |
| 137.5 | 4.9236239171 | 78.5 | 1 | |
| 142.2 | 4.9570317348 | 90.5 | 1 | |

Regression Output:

| | | |
|---|---|---|
| Constant | | 0 |
| Std Err of Y Est | | 0.00675619 |
| R Squared | | 0.99581919 |
| No. of Observations | | 13 |
| Degrees of Freedom | | 11 |
| X Coefficient(s) | 0.0030885119 | 4.6722538337 |
| Std Err of Coef. | 0.0000603383 | 0.002977354 |
| | 109.27563122 | |
| | 144.74 | |
| | 3.77% | 3.76% |

9210

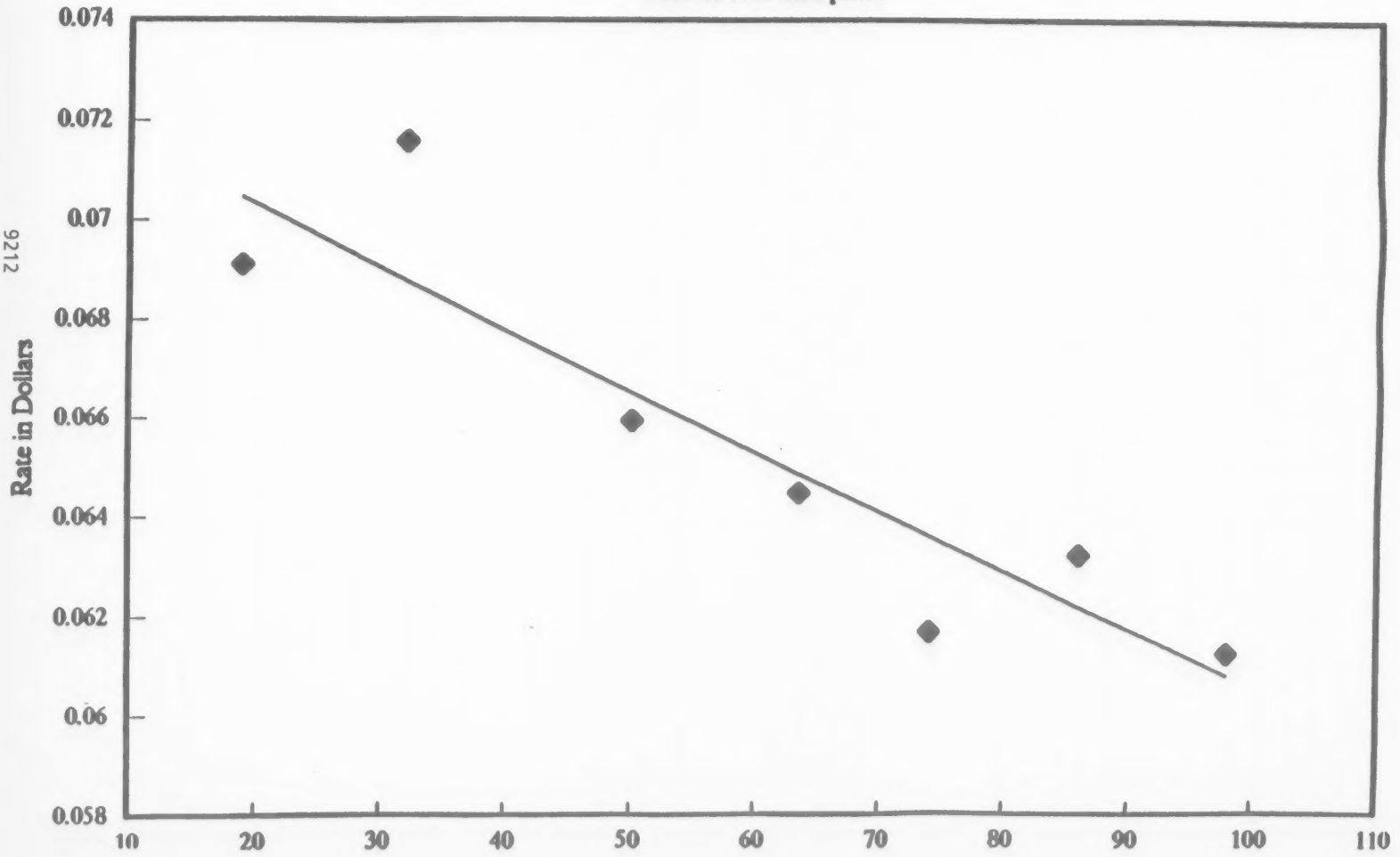

Adjusted Total Rate per Switched MOU
Rate in Dollars
0.074
0.072
0.07
0.068
0.066
0.064
0.062
0.06
0.058
10
20
30
40
50
60
70
80
90
100
110




XCALCLEC.WK3

# Adjusted Total Rate per Switched MOU

without 1984 data point



# APPENDIX F

## INPUT PRICES AND TOTAL FACTOR PRODUCTIVITY

by C. Anthony Bush and Mark Uretsky[1]

### I. Introduction

In a competitive market, the price of a product is driven to its economic costs by the forces of competition. If input prices of firms decline, price competition among incumbent firms and from new entrants that are enticed into the market by "economic profits"[2] drives the price of the product down to reflect the decline. Thus, under competition, declines in input prices flow through to consumers in the form of lower output prices.

Under the total factor productivity (TFP) framework, advocated by USTA and most exchange carriers, growth in TFP is a measure of the improvement by which factor inputs (labor, land, and capital) are combined within a firm or industry to produce outputs of goods and services. Changes in the cost of inputs are largely outside the firm's control and are excluded from such a measure. However, the TFP studies put on the record in this proceeding (Christensen Studies)[3] do allow measurement of input price changes as a byproduct of the measurement of TFP changes. Thus the results of the TFP studies include a measurement of the change in TFP as well as a separate measurement of the change in input prices.

All parties agree that, in competitive markets, changes in output prices reflect changes in input prices as well as changes in TFP. They also agree that, to replicate the results of a competitive market, a "productivity offset" to inflation (i.e., an X-Factor) must reflect both TFP changes and input price changes.[4] The parties disagree, however, as to the magnitude of the effect of including the input price changes. USTA argues that short-run (i.e., post-divestiture) measurements of input prices are unreliable and that the X-Factor should

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[1] Mr. Bush is Industry Economist and Mr. Uretsky is Chief Economist, Common Carrier Bureau, Federal Communications Commission.

[2] Economic profits are profits that exceed the cost of capital.

[3] USTA Comments, Attachment 6 (Christensen, Schoech, and Meitzen, "Productivity of the Local Telephone Operating Companies"); see also USTA January 12, 1995 Ex Parte (Christensen, Christensen, and Schoech, "Total Factor Productivity in the Bell System", Sept. 1981 ) and USTA January 20, 1995 Ex Parte.

[4] See USTA Comments, Attachment 5; National Economics Research Associates (NERA), "Economic Performance of the LEC Price Cap Plan" (NERA Study), pp. 8-11; Ad Hoc Reply, Attachment A; David J. Roddy and Lee L. Selwyn of Economics, Technology, Inc. (ETI), "An Empirical Estimate of the LEC Price Cap "X Factor" Based Upon Historic National LEC Productivity and Input Price Trends" (ETI Study), pp. 5-7 and pp. 10-15. AT&T Reply, Appendix C.

incorporate the long-run difference in input prices between the LEC industry and the U.S. economy, which USTA claims is zero.[5] Ad Hoc argues that the X-Factor should incorporate the difference in input prices between the LEC industry and the U.S. economy for the post-divestiture period, i.e., the same time period for which TFP is measured.[6] The effect of including input prices in the X-Factor is potentially large. For example, the inclusion of the effect of input prices under Ad Hoc's proposal would cause the X-Factor for the 1984 - 1992 period to increase from 2.3 percent to 5.2 percent.

In this appendix, we conclude that an X-Factor based on Christensen's LEC TFP data and the Bureau of Labor Statistic's (BLS) U.S. economy TFP data for the period 1984 - 1990[7] should include an adjustment for input prices. We also conclude that such input prices should be derived from Christensen's and BLS's TFP data for the same period (1984 - 1990). In addition, based on the latest data available from Christensen and the BLS, we find that such an X-Factor, excluding the consumer productivity dividend (CPD), would be at least 4.8 percent.

## II. Mathematical Background

In order to understand the debate over the proper treatment of input prices under a TFP approach, familiarity with several different formulas for the X-Factor is important. From a mathematical perspective, the various formulas cited by the parties are equivalent. In this section, the formulas are presented and derived. The percentage change in a variable is denoted by a prefix (%); multiplication is denoted by (*).

TFP is defined as the ratio of real (deflated) output to real input. For a simple model of one output and one input, we have:

$$TFP = Q / I, \qquad \text{(Equation 1)}$$

where
Q = output, and
I = input

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[5] NERA Study, p. 16; NERA Reply, p. 6.

[6] ETI Study, pp. 10 -17.

[7] Although the petitioners' arguments pertain to the post-divestiture period 1984 - 1992, we reach a finding in this Appendix specifically with respect to the period 1984 - 1990, because this is the period that is relevant for purposes of corroborating the findings of the recalculated "Frentrup-Uretsky" study that the X-Factor during the period 1984 - 1990 was 5.0 percent. See Appendix D.

We can show that growth in TFP equals growth in output less growth in input:[8]

$$\%TFP = \%Q - \%I, \qquad \text{(Equation 2)}$$

where
%TFP is percentage change in productivity,
%Q is percentage change in output, and
%I is percentage change in input

Assuming competition, it can be shown that, in general, the growth in TFP equals the growth in input prices less the growth in output prices:[9]

$$\%TFP = \%W - \%P \qquad \text{(Equation 3)}$$

where
%P is percentage change in price of each unit of output Q, and
%W is percentage change in price of each unit of input I

Given these equations, we can derive a formula for LEC price changes under perfect competition:[10]

$$\%P^{LEC} = \%P^{US} - [(\%TFP^{LEC} - \%TFP^{US}) - (\%W^{LEC} - \%W^{US})]$$

(Equation 4)

where
$\%P^{LEC}$ is percentage change in LEC output prices,
$\%P^{US}$ is percentage change in U.S. output prices (i.e., inflation),
$\%TFP^{LEC}$ is percentage change in TFP for the LEC industry,
$\%TFP^{US}$ is percentage change in the TFP for the U.S. economy,

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[8] Taking logarithms of equation (1) and differentiating with respect to time, noting that the time derivative of the logarithm of a variable is approximately equal to the percentage change of that variable, yields equation (2).

[9] In competitive equilibrium revenue equals cost:

$$P * Q = W * I.$$

Thus,

$$Q / I = W / P$$

and

$$TFP = W / P$$

Taking logarithms and differentiating with respect to time, noting that the time derivative of the logarithm of a variable is approximately equal to the percentage change of that variable, yields equation (3).

[10] Subtracting equation (3) for $TFP^{US}$ from equation (3) for $TFP^{LEC}$ and rearranging terms results in equation (4).

$\%W^{LEC}$ is percentage change in the input prices for the LEC industry,

and

$\%W^{US}$ is percentage change in the input prices for the U.S. economy.[11]

The term in brackets in equation (4) is the theoretical equivalent of the X-Factor (excluding the CPD), under the TFP framework. In other words, the X-Factor is the offset to inflation ($\%P^{US}$) which forces LEC price changes ($\%P^{LEC}$) to behave as would be required in a competitive market. Thus we have

$$X = (\%TFP^{LEC} - \%TFP^{US}) + (\%W^{US} - \%W^{LEC}),$$

(Equation 5)

The X-Factor depends on TFP differences between the LEC industry and the US economy ("TFP differential") and on input price differences between the LEC industry and the US economy ("input price differential").

It also can be shown that there is another, equivalent, formula for the X-Factor that replaces measures of TFP change and input price change for the US economy with a measure of output price change for the US economy:[12]

$$X = \%TFP^{LEC} + \%P^{US} - \%W^{LEC},$$ (Equation 6)

Furthermore, we can rewrite equation (3), as applied to LECs, as

$$\%P^{LEC} = \%W^{LEC} - \%TFP^{LEC}.$$ (Equation 7)

This means that using this approach is equivalent to just basing LEC output prices on LEC input prices and LEC productivity, without the need for any US aggregate data for prices or productivity.

III. Comments and Ex Partes

**Introduction.** The parties disagree on whether the input price differential for the 1984-1992 time period is an accurate or meaningful measurement. Both Christensen Associates (Christensen) and National Economics Research Associates (NERA), economic consultants to USTA, argue that short-run input price data exhibit substantial volatility and cannot be relied upon as accurate.[13] Christensen argues that the LEC input price series from

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[11] To construct US input price growth, private business sector TFP growth is added to GDP-PI growth. See USTA January 13, 1995 Ex Parte.

[12] Equation (6) can be derived by substituting the formula for $\%TFP^{US}$ from equation (3) into equation (5).

[13] See NERA Study; see also USTA February 1, 1995 Ex Parte, p. 9-10; NERA Reply, p. 31.

his TFP studies are not directly comparable to the U.S. input price series for the 1984 - 1992 time period and that, if a comparison is made, there will be substantial volatility in the input price differential. Christensen argues that the short-run differential between LEC and U.S. input prices should be ignored in favor of his finding that the long-run differential between LEC and U.S. input prices is zero.[14] NERA concurs with Christensen and outlines additional volatility problems with Christensen's LEC input price data for the 1984-1992 time period.[15]

Ad Hoc argues that LEC input price data for the 1984-1992 period are derived directly from Christensen's TFP studies and are as reliable as Christensen's TFP study. Further, Ad Hoc argues that these data show an important change in the long-run trend of LEC input prices and thus must be the basis for any input price component included in the X-Factor for the post-divestiture period.[16]

USTA According to USTA's economic consultants, only long-run measures of LEC input prices are reliable enough for inclusion in the X-Factor. They claim that because the long-run input price differential is zero, the input price differential in equation (5) should be zero and the X-Factor should simply reflect the TFP differential. USTA's economic consultants believe that the proper measurement of the X-Factor over the period 1984-1992 is 1.7 percent,[17] i.e., the difference between price cap LEC TFP growth and U.S. TFP growth for that period. Their reasoning, presented in various studies and ex parte filings, can be summarized as follows: (1) the input price differential can be estimated reliably only for the long-run; (2) the long-run measure of the input price differential is zero percent; and (3) therefore, the X-Factor should include only the TFP differential.

**The Long-Run.** USTA's economic consultants make several arguments in support of the view that the long-run input price differential is zero percent. In the USTA February 1, 1995 Ex Parte, Christensen argues:

> Telephone companies compete for labor, capital, and other inputs with all other sectors of the U.S. economy. Thus, one would expect input prices for telephone companies to have the same long-term trend as other sectors of the economy, and hence, the same as the entire U.S. economy. This expectation is validated by long-term historical

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[14] USTA February 1, 1995 Ex Parte, p. 9

[15] NERA Reply, pp. 28-32.

[16] Ad Hoc Reply, pp. 10-13; Ad Hoc Ex Parte, pp. 6-8. Ad Hoc, however, finds fault with downward revisions that Christensen made to the LEC input price series as reflected in the USTA February 1, 1995 Ex Parte. See also footnote 31, below.

[17] Subsequent changes in BLS's measurement of U.S. TFP and the corrections of errors in the Christensen TFP study result in a revised measure of the TFP differential of 2.1 percent. See USTA January 20, 1995 Ex Parte, p.16.

experience.[18]

USTA's economic consultants present various time-series (i.e., annual data for a sequence of years) to show that the input price differential is negligible and not statistically different than zero. NERA compares a time-series of telephone industry input price growth rates derived from various Christensen TFP studies and a time-series of U.S. economy input price growth rates that NERA constructs from BLS's TFP studies for the U.S. economy and measures of inflation.[19] The comparison is for the time period 1959 - 1992 and shows that the input price differential averages about 0.7 percent.[20] NERA claims that the input price differential of 0.7 percent is statistically indistinguishable from zero percent. Based on econometric techniques, NERA constructs a "95 percent confidence interval" using 0.7 percent. A "95 percent confidence interval" is an interval which captures the true mean of the input price differential with a probability of 95 percent. In NERA's study, the 95 percent confidence interval has an upper bound of 2.1 percent and a lower bound of -0.6 percent. NERA claims that because zero percent is within the 95 percent confidence interval, it is statistically indistinguishable from 0.7 percent.

Christensen presents a time-series of telephone industry and U.S. economy input price growth rates from 1949 to 1992 to show that the input price differential averages only 0.1 percent. Christensen conducts statistical tests of the hypothesis that the trend in input price growth for the telephone industry equals the trend in input price growth for the U.S. economy. In the Christensen Affidavit, Christensen concludes that there is no evidence that the input price trends differ.[21]

**The Short-Run.** USTA's economic consultants also present evidence regarding the short-run input price differential. Christensen tested whether the average input price differential was equal to zero for the period 1983-1992 and found that the difference is not statistically significant. According to Christensen, the average input price differential was 2.6 percent.[22] Christensen claims that this differential is statistically indistinguishable from zero percent, presumably because 2.6 percent falls within a 95 percent confidence interval, which

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[18] USTA February 1, 1995 Ex Parte, p. 5.

[19] NERA's time-series of U.S. economy input price growth rates is based on equation (3), above.

[20] USTA January 13, 1995 Ex Parte. Note that NERA computes the input price differential as $\%W^{US} - \%W^{LEC}$ so that positive 0.7 indicates that the change in LEC input prices is 0.7 percentage points less than the change in U.S. input prices.

[21] USTA February 1, 1995 Ex Parte, p. 5 (Christensen Affidavit).

[22] Christensen Affidavit and USTA February 22, 1995 Ex Parte.

also contains zero.[23]

Both NERA and Christensen claim that, in the short-run, LEC input price data contained in the Christensen Studies cannot be reliably compared to U.S. input price data. They contend that such a comparison will yield volatile results that can only be corrected by averaging prices over the long-run. Christensen argues that:

> There is no reason to expect telephone company input prices to rise slower than input price growth for other sectors of the U.S. economy. This concept is validated by the fact that the long-term trends are the same. Short-term input price data exhibit substantial volatility, but provide no evidence of divergent trends.[24]

NERA and Christensen offer various reasons for the volatility, all of which relate to the treatment of capital costs in Christensen's TFP studies.

Christensen asserts that his estimates of capital input prices for the LECs are based on a different method than the estimates of capital input prices for the U.S. economy derived from the BLS's TFP studies and that a comparison between them is invalid.[25] According to Christensen, because the BLS's measurement of U.S. TFP reflects economic profits as well as the opportunity cost of capital (interest rates), economic profits are included in the input price series for the U.S. economy. Christensen states that his measurements of LEC input prices exclude economic profits and are, therefore, not comparable to the U.S. input price series. According to Christensen, an input price differential based on subtracting one series from the other is invalid. Because the input price differential for the post-divestiture period reflects such a comparison, Christensen claims that it is invalid.

NERA points out that the input price indexes for the telephone industry are byproducts of Christensen's TFP studies and, because of the methods used in the studies to measure capital prices, are more volatile than ordinary input price indexes.[26] NERA argues that, although the accuracy of the measurement of capital prices is adequate for calculating changes in the LECs' TFP, it is not adequate for calculating changes in the LECs' input prices.[27] Such measurements, NERA asserts, are unrealistically volatile. Thus, NERA claims, short-run measurements of the input price differential are unreliable.

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[23] NERA also undertook a short-term study of post-divestiture data, but did not provide any supporting statistics.

[24] USTA February 1, 1995 Ex Parte, p. 9.

[25] USTA February 1, 1995 Ex Parte, pp. 8-9.

[26] NERA Reply, pp. 28-31.

[27] NERA Reply, pp. 28-31.

Ad Hoc In its reply, Ad Hoc submits a study by Economics, Technology, Inc. (ETI)[28] which argues that Christensen's and NERA's claim that the input price differential is zero and should be excluded from the calculation of the X-Factor is incorrect.[29] ETI maintains that the data derived from the Christensen Studies[30] show that the annual growth rate of LEC input prices was 1.1 percent[31] during the 1984 - 1992 period. ETI also points out that this growth rate is significantly different from 4.6 percent,[32] which ETI estimates was the growth rate of U.S. input prices during the same period.[33] Ad Hoc uses equation (6) to derive an X-Factor of 5.2 percent for the period 1984 - 1992.[34]

ETI claims that its figure for LEC input price growth for the 1984 - 1992 period should be considered as reliable as the Christensen TFP study because the figure is taken directly from that study. ETI also states that, like Christensen's measurement of TFP growth, it is a simple average for the 1984 - 1992 period and is based on data for a complete aggregation of large price cap companies, rather than a statistical sample.

Ad Hoc presents a theory regarding why input prices for the telephone industry are growing at a slower rate than input prices for the general economy during the post-divestiture period. Ad Hoc claims that slower growth is due, in part, to the substantial productivity and technological gains being experienced in those segments of the telecommunications industry that supply equipment and other capital resources to the LECs.[35] Ad Hoc contends that the telecommunications equipment market has become highly competitive in the decades since the

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[28] ETI Study, pp. 5-7 and pp. 10-15.

[29] ETI Study, p. 12.

[30] Such data includes LEC input prices for the 1984 - 1992 period as contained in USTA's Response of the United States Telephone Association to Ad Hoc's Motion to Compel and Motion for Extension of Time, June 2, 1994 (Christensen Supplemental Data).

[31] ETI Study, p. 13.

[32] ETI Study, p. 13.

[33] ETI relies on equation (3), above, and economic data from BLS to calculate U.S. input price growth of 4.6 percent as the sum of inflation (3.7 percent) and U.S. TFP growth (0.9 percent). Subsequently, BLS revised its estimate of US private business sector TFP growth from 0.9 percent to 0.3 percent, thereby raising Christensen's estimate of the TFP difference from 1.7 percent to 2.3 percent. This revision causes an offsetting change to Ad Hoc's calculation of the U.S. input price growth which declines from 4.6 percent to 4.0 percent. Subsequently, Christensen revised his measurement of the average annual change in LEC input prices for 1984-1992 from 1.1 percent to 1.7 percent. USTA January 20, 1995 Ex Parte. Ad Hoc challenged the validity of the change. Ad Hoc February 3, 1995 Ex Parte.

[34] ETI Study, p. 13. X (excluding CPD) = 2.6 percent (LEC TFP growth) + 3.7 percent (inflation) - 1.1 percent (LEC input price growth) = 5.2 percent.

[35] Ad Hoc February 2, 1995 Ex Parte, p. 6.

break-up of the former Bell System, when the Modified Final Judgment's (MFJ) "manufacturing restriction" was imposed. According to Ad Hoc, under the terms of the MFJ, Bell Operating Companies can no longer purchase equipment and supplies from captive affiliates, but, instead, must acquire such inputs on the competitive market.

Ad Hoc argues that, under competition, a firm's output prices must reflect both productivity changes and input price changes. A reduction of input prices reduces the cost of producing outputs. As firms compete, output prices are driven down to their cost. Ad Hoc concludes that "if LECs were to behave competitively, they would flow through declines in real (i.e., inflation-adjusted) input prices."[36] Ad Hoc concludes that under competition, "an input price decrease will be flowed through to consumers even if no productivity gain were to occur."[37]

AT&T Like Ad Hoc, AT&T opposes USTA's elimination of the input price differential in the estimate of the X-Factor. AT&T asserts that if TFP were to be used, the TFP differential must be adjusted for the difference between the change in GNP-PI and actual input price growth.[38] AT&T would use equation (5), above, to calculate the X-Factor (excluding the CPD) for the period 1984 - 1992 as 5.2 percent.[39]

According to AT&T, the LECs' earnings in the first price cap period exceeded the cost of capital. AT&T questions the theoretical validity of equation (3), given that equation (3) is true only for markets in which output prices are set at levels that allow firms to earn no more than the cost of capital. AT&T states that the theoretical link between Christensen's measurement of TFP growth derived from output and input quantity indices and equation (3) is invalid.[40] AT&T implies that the derivation of the X factor using equation (5) is invalid.

V. Discussion

**Introduction.** We agree with Ad Hoc's characterization of economic competition. In competitive market equilibrium, firms earn zero economic profits and revenues are equal to economic cost. If input prices for firms in the market decline, competition between existing firms and entry by new firms, which are attracted by economic profits, forces the output price down to cost, which now reflects the lower input prices. This implies that a reduction of input

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[36] Ad Hoc reply Comments, Attachment A, p. 11.

[37] Ad Hoc Reply, Attachment A, p. 16.

[38] AT&T Reply, pp. 28-29.

[39] X = 1.7 percent (the TFP differential) + 3.5 percent (the input price differential) = 5.2 percent. The TFP differential = 2.6 percent (LEC TFP growth) - 0.9 (U.S. TFP growth) = 1.7 percent. The input price differential = 4.6 percent (U.S. input price growth) - 1.1 percent (LEC input price growth) = 3.5 percent.

[40] AT&T Reply, Appendix C, pp. 8-9.

of input prices will be flowed through to consumers in the form of reduced output prices.

The price cap equations, described above, show that the only mechanism that flows changes in LEC input prices through to changes in LEC output prices is the input price differential. Thus, as a theoretical matter, we believe that inclusion of the input price differential, as specified in equation (5), for instance, is essential to the proper calculation of the X-Factor.

We believe that AT&T's contention that equation (5) erroneously omits a correction for LEC profit growth is unfounded. AT&T appears to be concerned that either the growth rate in LEC TFP or the growth rate in LEC input prices will be calculated using equation (3). However, under Christensen's framework, the growth rates for both LEC TFP and LEC input prices are not determined by reliance on equation (3). The X-Factor will not be biased by the LECs' economic profits. Used as a "productivity offset" as in equation (4), the X-Factor will result in output prices that mimic perfect competition.

The issue before us is to make a reasonable determination of the input price differential for the post-divestiture period and, in particular, the period 1984-1990. Specifically, we need to consider whether USTA is correct in its assertion that short-run measures of the input price differential are inaccurate and should be supplanted by a long-run estimate for use in calculating the X-Factor. We also need to consider whether the long-run estimate of the input price differential is indeed zero, as USTA claims.

We begin with an evaluation of the evidence regarding the input price differential for the post-divestiture period. Data on the TFP differential and the input price differential for the post-divestiture period has been placed in the record by USTA in the Christensen Supplemental Data, USTA January 13, 1995 Ex Parte, USTA January 20, 1995 Ex Parte, and the Christensen Affidavit. In the January 20, 1995 Ex Parte and the Christensen Affidavit, USTA filed its latest view of post-divestiture TFP and input price data. These data contain significant revisions to the earlier filings. These revisions apparently reflect corrections, contained in the January 20, 1995 USTA Ex Parte, to the Christensen TFP study which was filed as part of USTA's original comments. The LEC TFP growth and LEC input price growth for the post-divestiture period are significantly reduced from data contained in the earlier study. These data show that, for the eight year post-divestiture period (1984 - 1992), LEC input prices grew at an average annual rate of 1.7 percent, while U.S. economy input prices grew at an average annual rate of 4.0 percent, resulting in an input price differential of 2.2 percent (rounded). The TFP differential was 2.1 percent, resulting in an X-Factor of 4.3 percent, using equation (5). Making the same calculations for the 1984-1990 time period, we have an X-Factor of 4.8 percent, equal to the sum of the input price differential (2.7 percent) and TFP differential (2.1 percent). See Attachment A.[41]

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[41] Attachment A contains time-series data of annual percentage changes in input prices as well as other data. The entries are in sequence by year. Each year's entry represents the annual percentage growth in input prices over the prior year. For instance, the 1985 growth rate reflects growth from 1984 to 1985. Thus, growth from

In deciding whether to rely on the post-divestiture period for the purpose of calculating the input price differential, we are persuaded by Ad Hoc that significant weight should be placed on the fact that the LEC input price data for that period come directly from Christensen's own TFP study. However, USTA's economic consultants have raised several important criticisms regarding reliance on post-divestiture data which we need to consider before reaching a decision.

**Measurement Errors in the Post-Divestiture Input Price Data.** As described above, Christensen argues that measures of the post-divestiture input price differential which are based on a comparison between input price data derived from BLS studies and input price data derived from Christensen's own studies are invalid, because of differences in method.[42] We have reviewed BLS's technical literature on multifactor productivity and have verified that Christensen is correct that profits are included in BLS's measurement of capital costs. This implies that measurements of growth rates of U.S. TFP have profit embedded in them as do, in consequence, measurements of growth rates of U.S. input prices which are derived from growth rates in U.S. TFP.[43] However, we believe that an opposite bias of equal magnitude is contained in the TFP differential that USTA would use to set the X-Factor. See Attachment B. We conclude that the sum of the TFP differential and the input price differential will be unbiased and that the X-Factor, which equals the sum, will be unbiased.[44]

As described above, NERA argues that measurement problems related to capital prices cause volatility in the input price differential and make short-run measurements of the input price differential unreliable. NERA has not demonstrated, however, that these measurement problems introduce a bias into the input price series. Also, although NERA has shown that the measurement problems could cause considerable year to year fluctuations, NERA has not shown that such fluctuations could make a six year period (e.g., for 1984 - 1990) unreliable. Based on the record before us, we have no reason to conclude that the measurement problem that NERA describes affects the calculation of input price differential for the 1984 - 1990 period.

In summary, USTA's economic consultants' descriptions of problems in measuring changes in post-divestiture input prices fails to convince us that the problems are serious enough to warrant rejection of the measurements for use in calculating an X-Factor.

**Short-Run Versus Long-Run Measurement of the Input Price Differential.** We next consider whether we should rely on short-run or long-run input price data to forecast the

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in the average growth rate from 1986 - 1990.

[42] Christensen Affidavit, pp. 8-9.

[43] See equation (3), above.

[44] See equation (5).

future trend in input prices. In particular, we evaluate USTA's view that the post-divestiture input price differential is an aberration from an underlying long-run trend in which the differential is zero. To support this view, both Christensen and NERA have provided studies of input price time-series data, including statistical tests. For instance, the Christensen Affidavit contains input price data for the telephone industry and the U.S. economy from 1949 to 1992. Using this data, Christensen has performed statistical tests to see whether the hypothesis that the input price differential is zero over the long-run is refutable. Based on his calculations, he concludes that the hypothesis is valid. He also concludes that the deviation of the post-divestiture input price differential from the long-run trend is not significant in a statistical sense.

We disagree with this viewpoint for several reasons. First, Christensen has not supported his view that, because telephone companies compete for labor, capital, and other inputs with all other sectors of the economy, input prices for telephone companies should have the same long-run trend as the entire U.S. economy.[45] Assuming different rates of technological change among various sectors of the economy, the price of inputs to a particular sector simply may be changing more rapidly than that of the U.S. economy as a whole. This might be true especially for the telephone industry, in which the cost of many inputs, e.g., computers, switches, and fiber optic technology, appear to be growing less rapidly than cost of inputs for the U.S. economy as a whole. Christensen has not offered adequate theoretical support for his premise that telephone industry input prices should grow at the same rate as input prices in the economy generally.

Second, the various data series placed on the record by USTA are not all in accord that the long-run input price differential is, in fact, zero. In NERA's series from 1960 - 1992, the input price differential is 0.7 percent.[46] Although NERA claims that the 0.7 percent difference over the 32 year period is not significantly different from zero, NERA's statistical test is not convincing. NERA's finding that a mean of 0.7 percent is not statistically different than a mean of zero is based on a 95 percent confidence interval standard. We believe that such a test is too stringent when used to support a hypothesis with little theoretical support. The test shows that if zero were the true mean during this period, a sample mean greater or equal to 0.7 percent would occur less than approximately 15 percent of the time.[47] Based on NERA's evidence, we conclude it is more likely than not that a number greater than zero percent is the long-run input price differential.

Christensen presents a time-series of telephone industry and U.S. economy input price growth rates from 1949 to 1992 to show that the input price differential averages only 0.1

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[45] USTA February 1 Ex Parte, p. 5. See full quote in comment section, above.

[46] See comment section, above.

[47] In other words, a confidence interval of about 70 percent around the sample mean would not contain zero.

percent.[48] Although these numbers appear more consistent with a hypothesis of a zero percent long-run price differential, Christensen's time-series is completely different from NERA's. although both are based on data from various studies by Christensen.[49] Christensen has provided no justification for using a different version of the LEC input price series for the period 1960-1984 than NERA's version. Further, Christensen provides no justification for using a different beginning date for the series than NERA (1949 instead of 1960). Because of these discrepancies, we cannot accept Christensen's conclusion that the input price differential is zero.

Third, there is evidence that the input price differential for the post-divestiture period is not part of a zero long-run trend. Christensen attempts to show that the input price differential for the post-divestiture period (at least 2.6 percent) is not statistically different than zero. We do not find Christensen's showing to be convincing, for the same reasons we found unconvincing NERA's showing that 0.7 was not statistically different from zero. His finding that a mean of 2.6 percent is not statistically different than a mean of zero is based, again, on a 95 percent confidence interval standard. We believe that such a test is too stringent when used to support a hypothesis with little theoretical support. Looked at another way, the test shows that if zero were the true mean during this period, a sample mean greater or equal to 2.6 percent would occur less than approximately 7.5 percent of the time.[50] Based on this finding, we conclude there is evidence that the post-divestiture input price differential is not consistent with a long-run trend of zero percent.

We tested Ad Hoc's hypothesis that divestiture explains why LEC input prices appear to be growing at a substantially slower rate than economy-wide input prices during the 1984-1992 period. See Attachment C. We performed several statistical tests, all of which confirmed the plausibility of Ad Hoc's hypothesis. We regressed NERA's time series of telephone industry input prices for the period 1959-1992 (as updated for period 1984 - 1992 in the Christensen Affidavit) against NERA's time series of U.S. input prices, interest rates, and a binary variable for divestiture. We performed the same test for Christensen's time series of telephone company and U.S. input price data for the period 1948-1992. In both cases, we found divestiture to a significant factor. We also regressed the input price differential against interest rates and a binary variable for divestiture, for NERA's and Christensen's data, respectively. Our findings were the same as for the first two tests - divestiture appears to be a significant factor. Although more research needs to be done before we conclude that divestiture is a major factor in slowing the rate of growth of telephone company input prices, these tests provide evidence that the post-divestiture period represents a

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[48] USTA Ex Parte, February 1, 1995, p. 5. See comment section, above.

[49] For instance, Christensen's growth rates for telephone industry input prices are 4.2 percent for 1960, 3.9 percent for 1961, and 2.2 percent for 1962, compared to NERA's growth rates of 2.4 percent, 4.0 percent, and 3.1 percent, respectively. There are also serious discrepancies in the time series for U.S. input prices.

[50] In other words, a confidence interval of about 85 percent around the sample mean would not contain zero.

significant break from the past.

Based on these considerations, we believe that an input price differential based on long-run, pre-divestiture data is not a reasonable basis on which to calculate the input price differential for the post-divestiture period. We believe that the input price differential for the post-divestiture period should be calculated using post-divestiture data. In particular, we believe that the input price differential for the 1984-1990 period should be based on data from that period.

For purposes of calculating the historical X-Factor for the period 1984-1990 under a TFP framework, we conclude that the input price differential for the 1984-1990 period should be used. We also conclude that the input price differential for this period should be measured as the difference between the average 1984-1990 LEC input price change, derived from the Christensen study, and the average 1984-1990 U.S. input price change, derived from BLS TFP data. Relying on Christensen's and BLS's latest data, the X-Factor (excluding the CPD) for the 1984-1990 period is 4.8 percent.

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Attachment A

# Revised TFP and Input Price Study

| A<br>Year | B<br>US<br>Input Price<br>Growth | C<br>Telecom*<br>Input Price<br>Change | D<br>Difference<br>US Input –<br>Telecom Input | E<br>Telecom<br>TFP Growth | F<br>US TFP<br>Growth | G<br>Difference<br>Telecom TFP*<br>–US TFP | H<br>X Factor |
|---|---|---|---|---|---|---|---|
| 1980 | 1.70% | 2.40% | –0.70% | 3.80% | 0.40% | 3.50% | 2.80% |
| 1981 | 2.90% | 4.00% | –1.10% | 2.20% | 2.10% | 0.10% | –1.00% |
| 1982 | 4.50% | 3.10% | 1.40% | 3.00% | 3.70% | –0.70% | 0.70% |
| 1983 | 3.90% | 4.90% | –1.00% | 2.30% | 2.90% | –0.60% | –1.60% |
| 1984 | 5.40% | 2.40% | 3.00% | 3.10% | 4.10% | –1.00% | 2.00% |
| 1985 | 4.40% | 2.40% | 2.00% | 2.80% | 3.10% | –0.20% | 1.80% |
| 1986 | 5.50% | 1.50% | 4.00% | 4.30% | 3.00% | 1.30% | 5.30% |
| 1987 | 2.80% | 5.00% | –2.20% | 3.30% | 0.40% | 2.90% | 0.70% |
| 1988 | 6.40% | 6.10% | 0.30% | 4.40% | 2.60% | 1.80% | 2.10% |
| 1989 | 4.00% | 2.70% | 1.30% | 3.60% | –0.30% | 4.10% | 5.40% |
| 1990 | 3.20% | 4.00% | –0.80% | 0.60% | –0.30% | 0.90% | 0.10% |
| 1991 | 6.60% | 6.50% | 0.10% | 1.10% | 3.20% | –2.10% | –2.00% |
| 1992 | 6.00% | 7.60% | –1.60% | 4.00% | 2.90% | 1.10% | –0.50% |
| 1993 | 6.60% | 6.60% | 2.00% | 4.30% | 3.00% | 1.30% | 3.30% |
| 1994 | 4.20% | 4.80% | –0.60% | 3.70% | –3.50% | 7.20% | 6.60% |
| 1975 | 6.50% | 9.30% | –0.80% | 2.80% | 0.50% | 2.30% | 1.50% |
| 1976 | 9.20% | 9.20% | 0.00% | 4.40% | 3.90% | 0.50% | 0.50% |
| 1977 | 7.30% | 4.80% | 2.50% | 3.60% | 2.20% | 1.40% | 3.90% |
| 1978 | 7.00% | 7.30% | –0.30% | 4.80% | 0.70% | 4.10% | 3.80% |
| 1979 | 7.70% | 2.90% | 4.80% | 4.20% | –0.70% | 4.90% | 9.70% |
| 1980 | 7.00% | 6.90% | 0.10% | n/a | –2.30% | n/a | n/a |
| 1981 | 9.50% | 11.00% | –1.50% | n/a | 0.20% | n/a | n/a |
| 1982 | 3.10% | 9.30% | –6.20% | n/a | –3.20% | n/a | n/a |
| 1983 | 6.20% | 13.70% | –7.50% | n/a | 2.30% | n/a | n/a |
| 1984 | 6.50% | 1.80% | 4.70% | n/a | 3.10% | n/a | n/a |
| *1985 | 4.00% | 0.13% | 3.87% | 1.10% | 0.50% | 0.60% | 4.47% |
| *1986 | 3.80% | 1.31% | 2.49% | 2.80% | 1.00% | 1.80% | 4.29% |
| *1987 | 3.20% | 1.71% | 1.49% | 1.80% | 0.10% | 1.70% | 3.19% |
| *1988 | 4.60% | –3.21% | 7.81% | 2.10% | 0.60% | 1.50% | 9.31% |
| *1989 | 4.20% | –3.66% | 7.86% | 2.00% | –0.30% | 2.30% | 10.16% |
| *1990 | 4.30% | 11.89% | –7.59% | 4.60% | –0.30% | 4.90% | –2.69% |
| *1991 | 2.90% | 1.36% | 1.55% | 1.20% | –1.10% | 2.30% | 3.85% |
| *1992 | 5.10% | 4.46% | 0.65% | 3.50% | 1.90% | 1.60% | 2.25% |
| *1993 | n/a | –0.66% | n/a | 2.60% | n/a | n/a | n/a |
| 60–79 Average | 5.5% | 4.9% | 0.6% | 3.3% | 1.7% | 1.6% | 2.3% |
| 60–82 Average | 5.3% | 4.7% | 0.6% | na | 1.1% | na | 2.4% |
| 60–93 Average | na | 4.5% | na | na | na | na | na |
| 60–79,85 –80 Avg | 5.2% | 4.1% | 1.1% | 3.1% | 1.4% | 1.8% | 2.8% |
| 60–79,85 –82 Avg | 5.1% | 4.0% | 1.1% | 3.1% | 1.3% | 1.8% | 2.9% |
| 85–90 Average | 4.0% | 1.4% | 2.7% | 2.4% | 0.3% | 2.1% | 4.8% |
| 85–91 Average | 3.8% | 1.4% | 2.5% | 2.2% | 0.1% | 2.2% | 4.7% |
| 85–92 Average | 4.0% | 1.7% | 2.3% | 2.4% | 0.3% | 2.1% | 4.4% |
| 86–90 Average | 4.0% | 1.6% | 2.4% | 2.7% | 0.2% | 2.4% | 4.9% |
| 86–91 Average | 3.8% | 1.6% | 2.3% | 2.4% | 0.0% | 2.4% | 4.7% |
| 86–92 Average | 4.0% | 2.0% | 2.0% | 2.6% | 0.3% | 2.3% | 4.3% |
| 86–93 Average | na | 1.6% | na | 2.6% | na | na | na |
| 87–90 Average | 4.1% | 1.7% | 2.4% | 2.6% | 0.0% | 2.6% | 5.0% |
| 87–91 Average | 3.8% | 1.6% | 2.2% | 2.3% | –0.2% | 2.5% | 4.8% |
| 91–92 Average | 4.0% | 2.9% | 1.1% | 2.4% | 0.4% | 2.0% | 3.1% |
| 91–93 Average | na | 1.6% | na | 2.4% | na | na | na |

Notes:

Col. B: Input Price Data from 1980 to 1984 from USTA Ex Parte, Jan 13, Table 2.
Input Price Data from 1985 to 1992 from USTA Ex Parte, Jan 13, Table 1.
Col C: Input Price Data from 1980 to 1984 from USTA Ex Parte, Jan 13, Table 2.
Input Price Data from 1985 to 1993 from USTA Ex Parte, Jan 20, on disk only – PROD.WK3
1985–1993 data revised from USTA Ex Parte, Jan 13, Table 1.
Col. E: Bell System TFP Data from 1980 to 1979 from USTA Ex Parte, Jan 12, Table 19.
Data is available back to 1947.
RBOC and GTE TFP Data from 1985 to 1993 from USTA Ex Parte, Jan 20, Table 1.
Col. F: US TFP Data from 1980 to 1984 from USTA Ex Parte, Jan 13, Table 2.
US TFP Data from 1985 to 1992 from USTA Ex Parte, Jan 13, Table 1.

## Profit Bias in the Input Price Differential

For the period 1984-1992 (USTA February 1, 1995 Ex Parte), Christensen calculates the U.S. input price growth as

$$\%W^{US} = GDPPI + \%TFP^{US} \qquad \text{(Equation 1)}$$

NERA (in USTA's January 13, 1995 Ex Parte) employed equation (1) to construct U.S. input price growth for the period 1960-1984, however GNP-PI was used instead of GDP-PI. Given that GDP-PI is the rate of growth of an output price index, the measurement problems associated with profits enters U.S. input price growth through U.S. TFP growth.

However, USTA's measurement of $X^{USTA}$ as the differential rate of growth of TFP,

$$\%TFP^{LEC} - \%TFP^{US},$$

contains the same distortion as the input price differential since it also relies on

$$\%TFP^{US}$$

computed by BLS. Further, as we show below the two distortions cancel out. Let a superscript of * denote the absences of profits in US calculations. Note, all LEC measurements do not include profits. Letting $\Delta$ be the term reflecting the effects of profits, then

$$\%W^{US} = \%W^{*US} + \Delta = GDPPI + \%TFP^{*US} + \Delta\ , \qquad \text{(Equation 2)}$$

where

$$\%TFP^{US} = \%TFP^{*US} + \Delta$$

For the LECs we have

$$\%W^{LEC} = \%P^{LEC} + \%TFP^{LEC} \qquad \text{(Equation 3)}$$

Subtracting equation (3) from equation (2), we have

$$\%W^{US} - \%W^{LEC} = GDPPI + \%TFP^{US} - (\%P^{LEC} + \%TFP^{LEC}) \qquad \text{(Equation 4)}$$

This implies

$$\%P^{LEC} = GDPPI - (\%W^{US} - \%W^{LEC}) - (\%TFP^{LEC} - \%TFP^{US}) \qquad \text{(Equation 5)}$$

Equivalently,

$$\%P^{LEC} = GDPPI - (\%W^{*US} + \Delta - \%W^{LEC}) - (\%TFP^{LEC} - \%TFP^{*US} - \Delta) \qquad \text{(Equation 6)}$$

Thus, the $\Delta$ cancels out. This implies that

$$\%P^{LEC} = GDPPI - (\%W^{*US} - \%W^{LEC}) - (\%TFP^{LEC} - \%TFP^{*US}) \qquad \text{(Equation 7)}$$

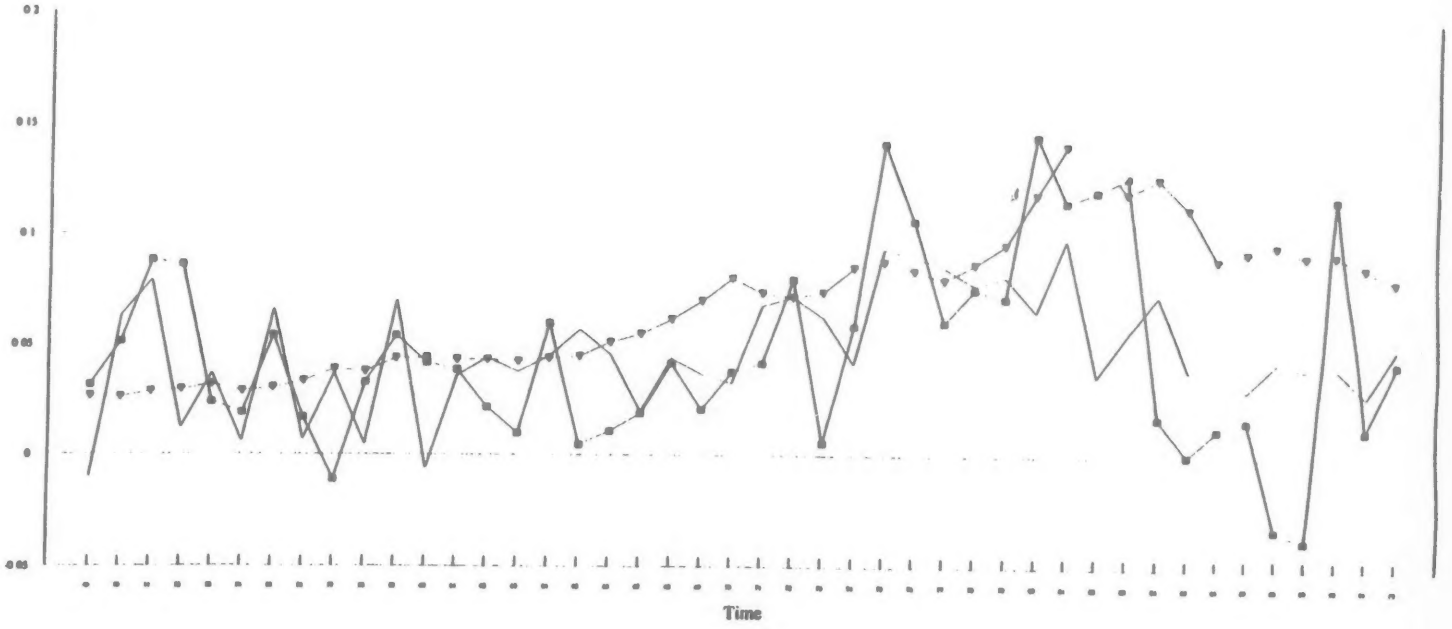
which gives us a correct measurement of X, where

$$X = (\%W^{*US} - \%W^{LEC}) + (\%TFP^{LEC} - \%TFP^{*US}) \qquad \text{(Equation 8)}$$

Therefore, we conclude that the input price differential is, in fact, an essential component of the X factor to correct the distortion in USTA's own measurement of TFP differential.

**Attachment C**

# Telephone Input Price Growth




Telephone Input Price Growth

US Input Price Growth

Moody's Yield on PU Bonds

Source: USTA Ex Parte, February 1, 1995, Christensen Affidavit

Moody's Yield on Public Utility Bonds, Economic Report of the President, 1994

# Regression: Telephone Input Price Growth - NERA Data

| | Telephone Input Price Change (1) | US Input Price Change (2) | Divestiture | Moody's Yield Public Utility Bonds |
|---|---|---|---|---|
| 1960 | 2.4% | 1.7% | 0 | 4.41% |
| 1961 | 4.0% | 2.9% | 0 | 4.35% |
| 1962 | 3.1% | 4.5% | 0 | 4.33% |
| 1963 | 4.9% | 3.9% | 0 | 4.26% |
| 1964 | 2.4% | 5.4% | 0 | 4.40% |
| 1965 | 2.4% | 4.4% | 0 | 4.49% |
| 1966 | 1.5% | 5.5% | 0 | 5.13% |
| 1967 | 5.0% | 2.8% | 0 | 5.51% |
| 1968 | 6.1% | 6.4% | 0 | 6.18% |
| 1969 | 2.7% | 4.0% | 0 | 7.03% |
| 1970 | 4.0% | 3.2% | 0 | 8.04% |
| 1971 | 6.5% | 6.6% | 0 | 7.39% |
| 1972 | 7.6% | 6.0% | 0 | 7.21% |
| 1973 | 6.6% | 8.6% | 0 | 7.44% |
| 1974 | 4.8% | 4.2% | 0 | 8.57% |
| 1975 | 9.3% | 8.5% | 0 | 8.83% |
| 1976 | 9.2% | 9.2% | 0 | 8.43% |
| 1977 | 4.8% | 7.3% | 0 | 8.02% |
| 1978 | 7.3% | 7.0% | 0 | 8.73% |
| 1979 | 2.9% | 7.7% | 0 | 9.63% |
| 1980 | 6.9% | 7.0% | 0 | 11.94% |
| 1981 | 11.0% | 9.5% | 0 | 14.17% |
| 1982 | 9.3% | 3.1% | 0 | 13.79% |
| 1983 | 13.7% | 6.2% | 0 | 12.04% |
| 1984 | 1.8% | 6.5% | 1 | 12.71% |
| 1985 | 0.1% | 4.0% | 1 | 11.37% |
| 1986 | 1.3% | 3.8% | 1 | 9.02% |
| 1987 | 1.7% | 3.2% | 1 | 9.38% |
| 1988 | -3.2% | 4.6% | 1 | 9.71% |
| 1989 | -3.7% | 4.2% | 1 | 9.26% |
| 1990 | 11.9% | 4.3% | 1 | 9.32% |
| 1991 | 1.3% | 2.9% | 1 | 8.77% |
| 1992 | 4.4% | 5.1% | 1 | 8.14% |
| Avg 60-84 | 5.6% | 5.7% | | |
| Avg 60-92 | 4.7% | 5.3% | | |
| Avg 85-92 | 1.7% | 4.0% | | |

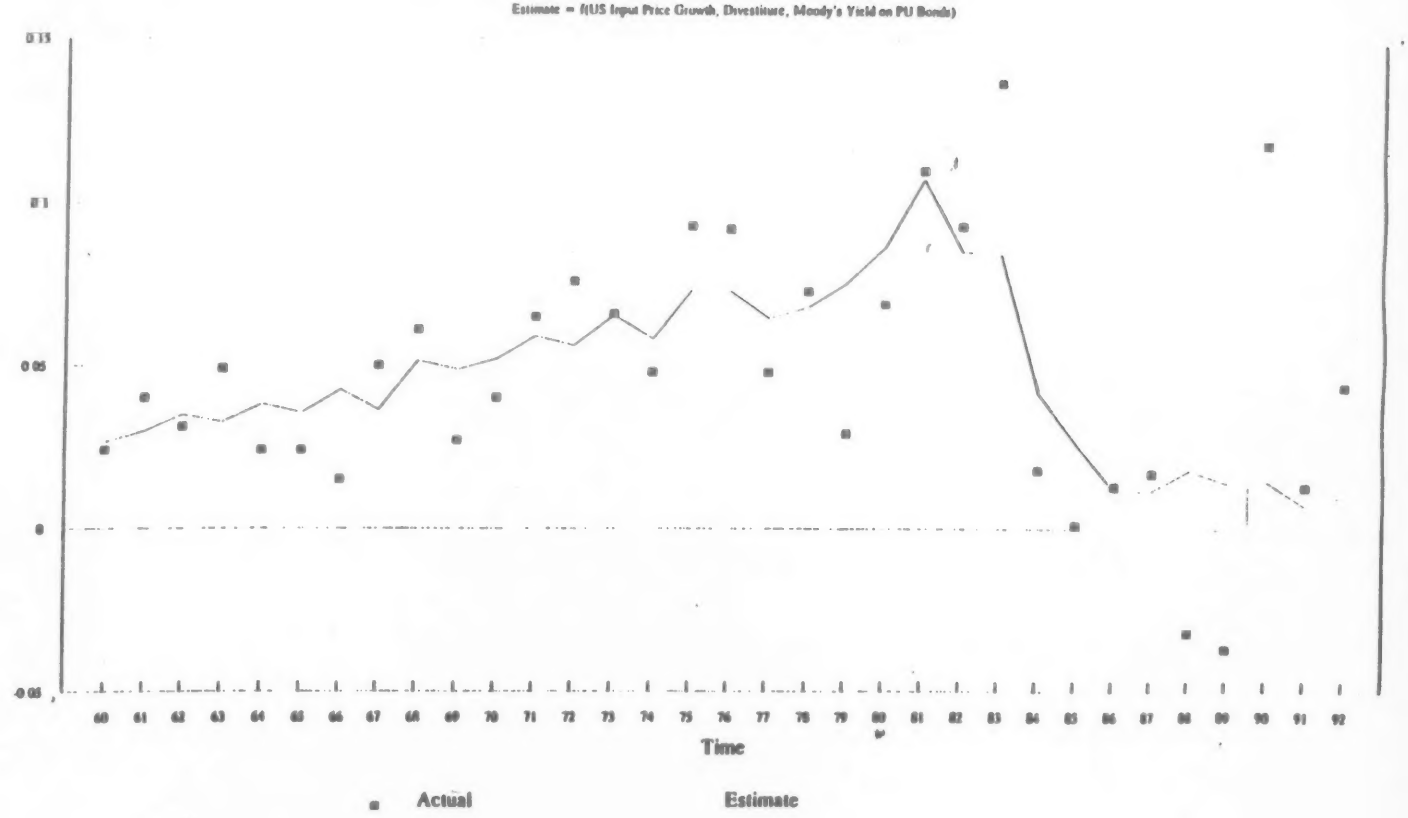
Regression Output:

| | | | |
|---|---|---|---|
| Constant | | | -0.0046 |
| Std Err of Y Est | | | 0.0308 |
| R Squared | | | 0.4440 |
| No. of Observations | | | 33 |
| Degrees of Freedom | | | 29 |
| | US IPr | Divestiture | Moody |
| X Coefficient(s) | 0.3140 | -0.0480 | 0.5794 |
| Std Err of Coef. | 0.3179 | 0.0144 | 0.2350 |
| T-Statistic | 0.9878 | -3.3365 | 2.4653 |

F-Statistic
3, 29 7.7208

Sources: NERA US Input Prices (1960-1992), USTA Ex Parte 1/13/95
NERA Telecom Input Prices 1960 -1984, USTA Ex Parte 1/13/95
LEC Input Price Growth, 1993 Data Point TFP Update 1985-1992, USTA Ex Parte 2/1/95

# Telephone Input Price Growth




Sources: NERA US Input Prices (1960-1992), USTA Ex Parte, January 13, 1995
NERA Telecom Input Prices (1960-1994), USTA Ex Parte, January 13, 1995
LEC Input Price Growth, 1993 Data Point TFP Update (1988-1992), USTA Ex Parte February 1, 1995

# Regression: Telephone Input Price Growth - Christensen Affidavit Data

| Year | obs | TEL Input Price | US Input Price | Divestiture | Moody's Yield on PU Bonds |
|---|---|---|---|---|---|
| 1949 | 1 | 3.2% | -1.0% | 0 | 2.66% |
| 1950 | 2 | 5.1% | 6.3% | 0 | 2.62% |
| 1951 | 3 | 8.8% | 7.9% | 0 | 2.86% |
| 1952 | 4 | 8.6% | 1.2% | 0 | 2.96% |
| 1953 | 5 | 2.4% | 3.7% | 0 | 3.20% |
| 1954 | 6 | 1.9% | 0.8% | 0 | 2.90% |
| 1955 | 7 | 5.4% | 6.8% | 0 | 3.06% |
| 1956 | 8 | 1.7% | 0.7% | 0 | 3.36% |
| 1957 | 9 | -1.1% | 3.7% | 0 | 3.89% |
| 1958 | 10 | 3.3% | 0.5% | 0 | 3.79% |
| 1959 | 11 | 5.4% | 7.0% | 0 | 4.38% |
| 1960 | 12 | 4.2% | -0.8% | 0 | 4.41% |
| 1961 | 13 | 3.9% | 3.8% | 0 | 4.35% |
| 1962 | 14 | 2.2% | 4.4% | 0 | 4.33% |
| 1963 | 15 | 1.0% | 3.8% | 0 | 4.26% |
| 1964 | 16 | 6.0% | 4.5% | 0 | 4.40% |
| 1965 | 17 | 0.5% | 5.7% | 0 | 4.49% |
| 1966 | 18 | 1.1% | 4.6% | 0 | 5.13% |
| 1967 | 19 | 1.9% | 2.0% | 0 | 5.51% |
| 1968 | 20 | 4.2% | 4.4% | 0 | 6.18% |
| 1969 | 21 | 2.1% | 3.7% | 0 | 7.03% |
| 1970 | 22 | 3.8% | 3.3% | 0 | 8.04% |
| 1971 | 23 | 4.2% | 6.8% | 0 | 7.39% |
| 1972 | 24 | 8.0% | 7.2% | 0 | 7.21% |
| 1973 | 25 | 0.6% | 6.3% | 0 | 7.44% |
| 1974 | 26 | 5.9% | 4.2% | 0 | 8.57% |
| 1975 | 27 | 14.2% | 9.4% | 0 | 8.83% |
| 1976 | 28 | 10.7% | 9.1% | 0 | 8.43% |
| 1977 | 29 | 6.1% | 8.6% | 0 | 8.02% |
| 1978 | 30 | 7.6% | 7.8% | 0 | 8.73% |
| 1979 | 31 | 7.2% | 8.2% | 0 | 9.63% |
| 1980 | 32 | 14.6% | 6.6% | 0 | 11.94% |
| 1981 | 33 | 11.6% | 9.9% | 0 | 14.17% |
| 1982 | 34 | 12.1% | 3.7% | 0 | 13.79% |
| 1983 | 35 | 12.8% | 5.6% | 0 | 12.04% |
| 1984 | 36 | 1.8% | 7.4% | 1 | 12.71% |
| 1985 | 37 | 0.1% | 4.0% | 1 | 11.37% |
| 1986 | 38 | 1.3% | 3.8% | 1 | 9.02% |
| 1987 | 39 | 1.7% | 3.1% | 1 | 9.38% |
| 1988 | 40 | -3.2% | 4.4% | 1 | 9.71% |
| 1989 | 41 | -3.7% | 4.1% | 1 | 9.26% |
| 1990 | 42 | 11.9% | 4.2% | 1 | 9.32% |
| 1991 | 43 | 1.3% | 2.9% | 1 | 8.77% |
| 1992 | 44 | 4.4% | 5.1% | 1 | 8.14% |
| 1993 | | | | | |
| Avg 49-92 | | 4.7% | 4.8% | | |
| Avg 49-84 | | 5.4% | 4.8% | | |
| Avg 84-92 | | 1.7% | 4.9% | | |

Regression Output:

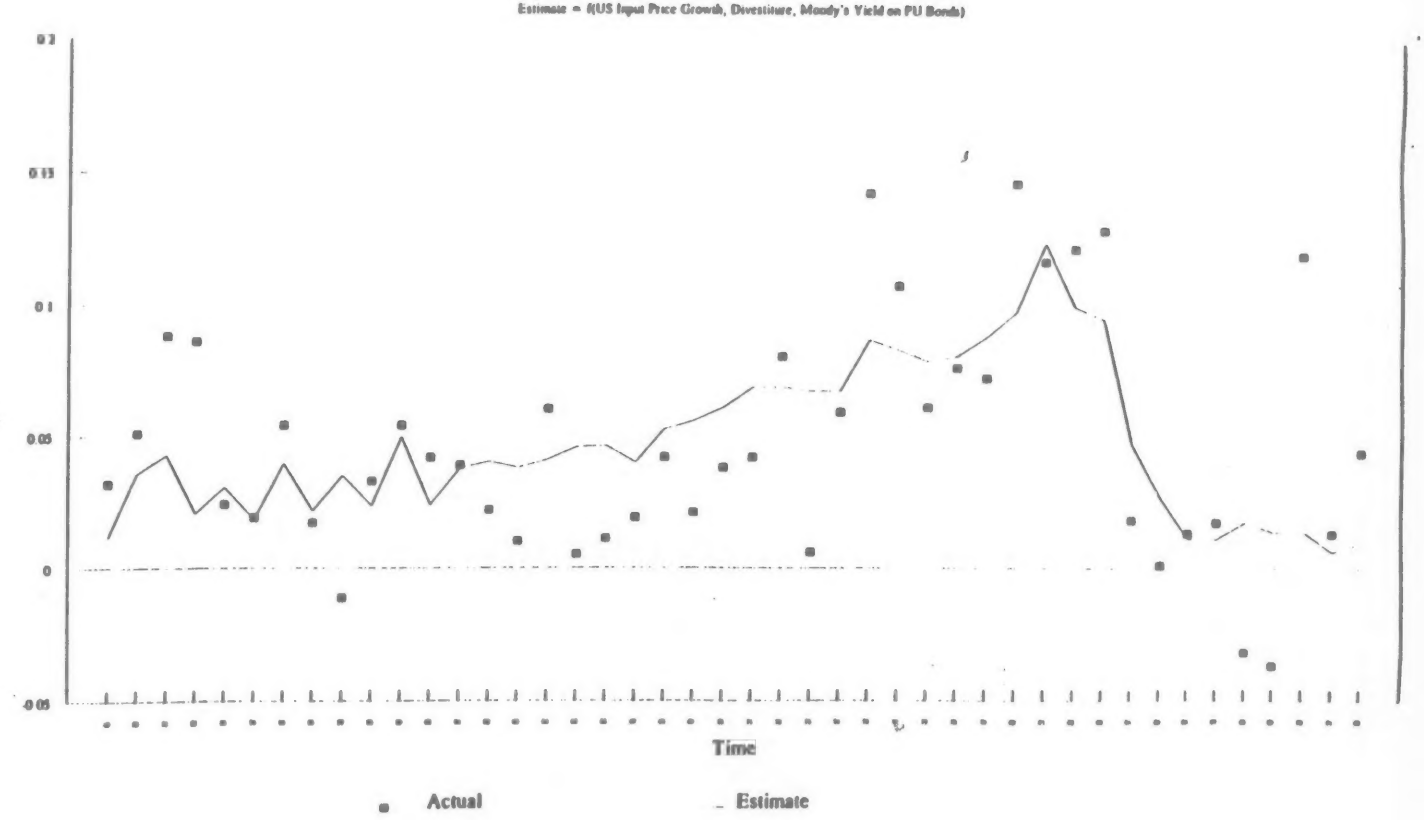
| | |
|---|---|
| Constant | -0.0027 |
| Std Err of Y Est | 0.0347 |
| R Squared | 0.4322 |
| No. of Observations | 44 |
| Degrees of Freedom | 40 |

| | US IPr G | Divestiture | Moody's |
|---|---|---|---|
| X Coefficient(s) | 0.3402 | -0.0579 | 0.6489 |
| Std Err of Coef. | 0.2338 | 0.0152 | 0.2093 |
| T-Statistic | 1.4553 | -3.8142 | 3.1007 |

F-Statistic 10.1512
df (3,40)

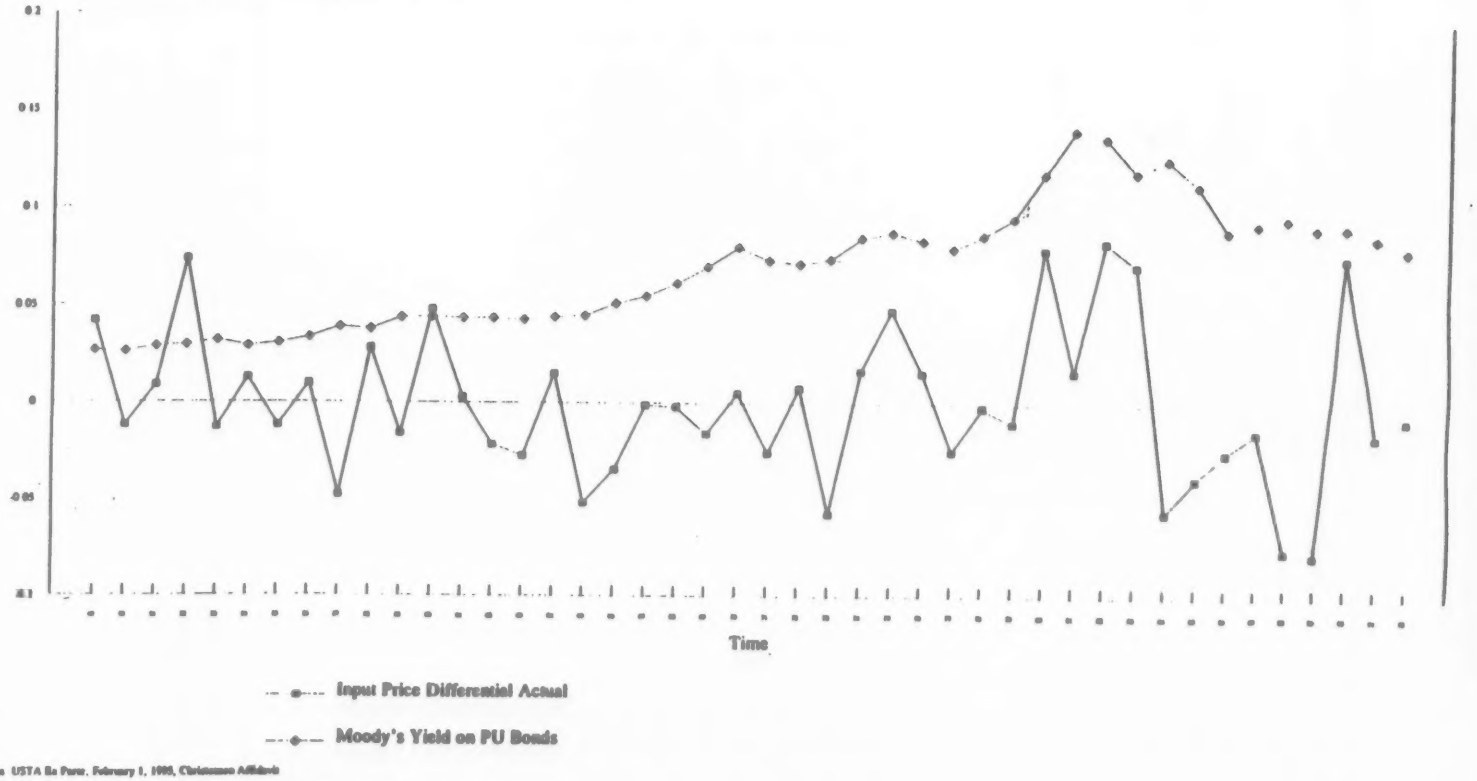
Source: USTA Ex Parte, February 1, 1995, Christensen Affidavit

# Telephone Input Price Growth




Data: USTA Ex Parte, February 1, 1988, Christensen Affidavit

**Input Price Differential & Moody' Yield on PU Bonds**




Source: USTA Ex Parte, February 1, 1995, Christensen Affidavit

Moody's Yield on Public Utility Bonds is from the Economic Report of the President, 1994

## Regression: Input Price Differential (NERA Data)

| | LEC-US Input Price Growth | Divestiture | Moody's Yield Public Utility Bonds |
|---|---|---|---|
| 1960 | 0.70% | 0 | 4.41% |
| 1961 | 1.10% | 0 | 4.35% |
| 1962 | -1.40% | 0 | 4.33% |
| 1963 | 1.00% | 0 | 4.26% |
| 1964 | -3.00% | 0 | 4.40% |
| 1965 | -2.00% | 0 | 4.49% |
| 1966 | -4.00% | 0 | 5.13% |
| 1967 | 2.20% | 0 | 5.51% |
| 1968 | -0.30% | 0 | 6.18% |
| 1969 | -1.30% | 0 | 7.03% |
| 1970 | 0.80% | 0 | 8.04% |
| 1971 | -0.10% | 0 | 7.39% |
| 1972 | 1.60% | 0 | 7.21% |
| 1973 | -2.00% | 0 | 7.44% |
| 1974 | 0.60% | 0 | 8.57% |
| 1975 | 0.80% | 0 | 8.83% |
| 1976 | 0.00% | 0 | 8.43% |
| 1977 | -2.50% | 0 | 8.02% |
| 1978 | 0.30% | 0 | 8.73% |
| 1979 | -4.80% | 0 | 9.63% |
| 1980 | -0.10% | 0 | 11.94% |
| 1981 | 1.50% | 0 | 14.17% |
| 1982 | 6.20% | 0 | 13.79% |
| 1983 | 7.50% | 0 | 12.04% |
| 1984 | -4.70% | 1 | 12.71% |
| 1985 | -3.90% | 1 | 11.37% |
| 1986 | -2.50% | 1 | 9.02% |
| 1987 | -1.50% | 1 | 9.38% |
| 1988 | -7.80% | 1 | 9.71% |
| 1989 | -7.90% | 1 | 9.26% |
| 1990 | 7.60% | 1 | 9.32% |
| 1991 | -1.60% | 1 | 8.77% |
| 1992 | -0.70% | 1 | 8.14% |
| Avg 60-84 | -0.1% | | |
| Avg 60-92 | -0.8% | | |
| Avg 85-92 | -2.3% | | |

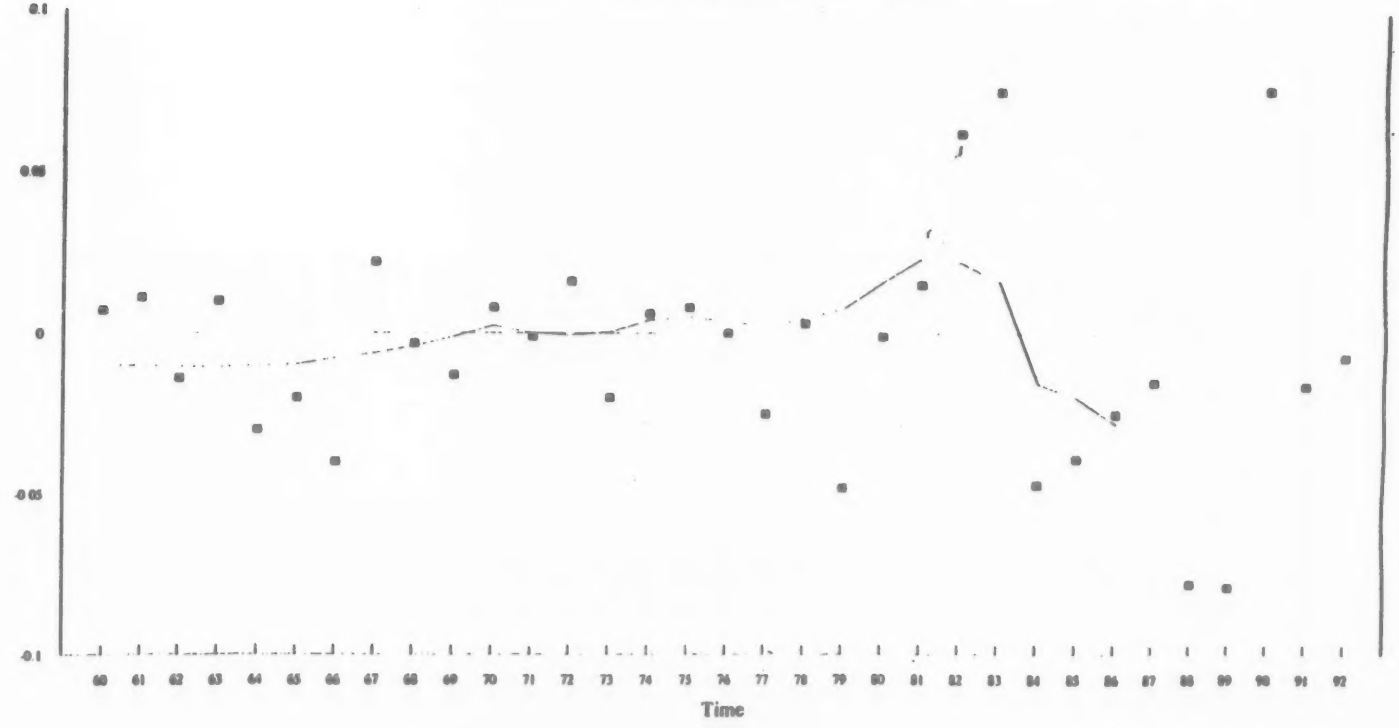
Regression Output:

| | | | |
|---|---|---|---|
| Constant | | | -0.0251 |
| Std Err of Y Est | | | 0.0327 |
| R Squared | | | 0.1848 |
| No. of Observations | | | 33 |
| Degrees of Freedom | | | 30 |
| | | Divestiture | Moody |
| X Coefficient(s) | | -0.0338 | 0.3419 |
| Std Err of Coef. | | 0.0135 | 0.2200 |
| t-statistic | | -2.4935 | 1.5543 |
| F-statistic | 3.4001 | | |
| df(2,30) | | | |

Sources: NERA US Input Prices (1960-1992), USTA Ex Parte, January 13, 1995
NERA Telecom Input Prices 1960 -1984, USTA Ex Parte, January 13, 1995
LEC Input Price Growth, 1993 Data Point TFP Update 1985-1992, USTA Ex Parte, February 1, 1995

# Input Price Differential

Estimate = f(Divestiture, Moody's Yield on PU Bonds)




Sources: NERA US Input Prices (1960-1992), USTA Ex Parte, January 13, 1995
NERA Telecom Input Prices (1960-1984), USTA Ex Parte, January 13, 1995
LEC Input Price Growth (1985-1992), 1993 Data Point Update, USTA Ex Parte, February 1, 1995

## Regression: Input Price Differential (Christensen Affidavit)

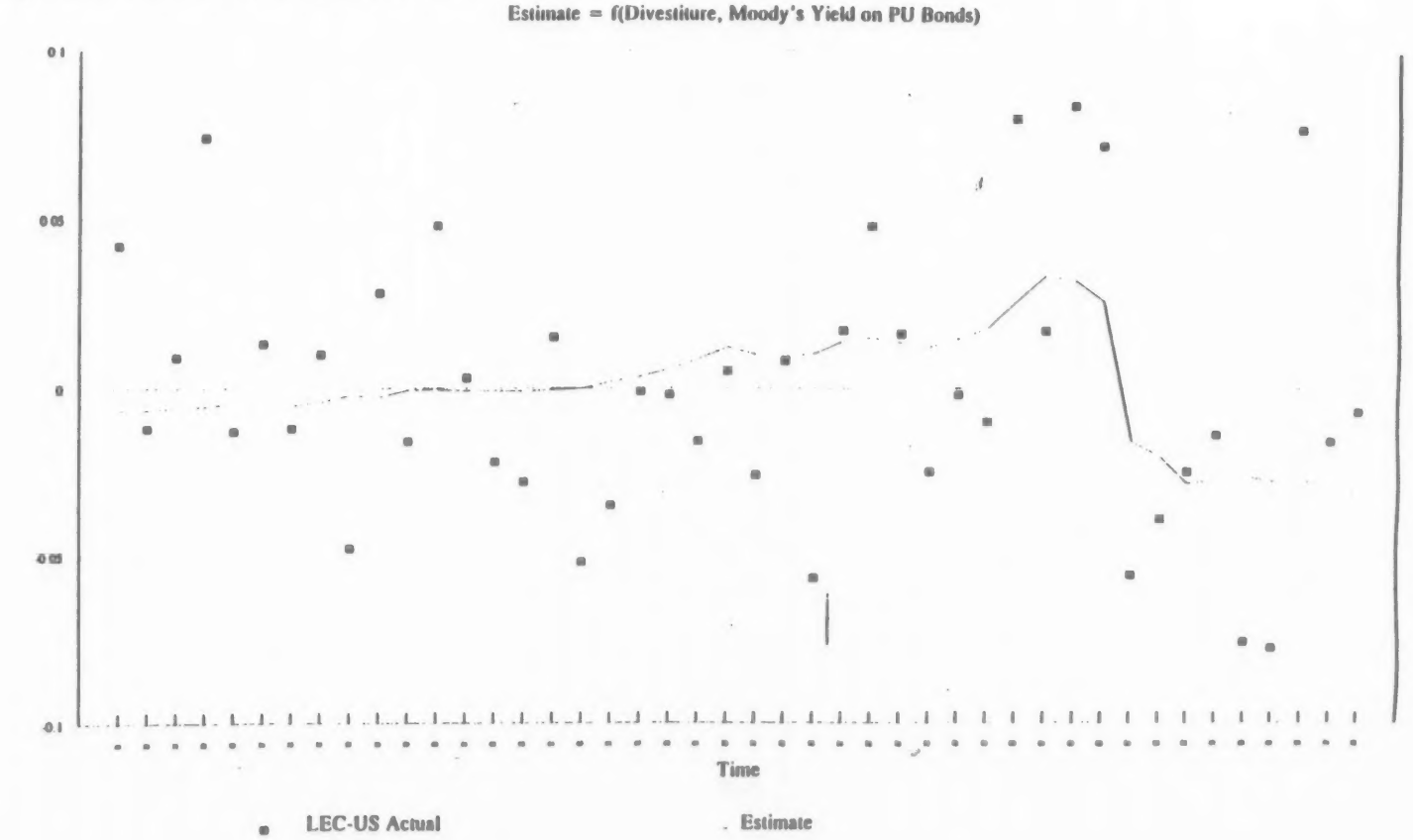
| Year | obs | LEC-US Input Price Growth | Divestiture | Moody's Yield on Public U Bonds |
|---|---|---|---|---|
| 1949 | 1 | 4.20% | 0 | 2.66% |
| 1950 | 2 | -1.20% | 0 | 2.62% |
| 1951 | 3 | 0.90% | 0 | 2.86% |
| 1952 | 4 | 7.40% | 0 | 2.96% |
| 1953 | 5 | -1.30% | 0 | 3.20% |
| 1954 | 6 | 1.30% | 0 | 2.90% |
| 1955 | 7 | -1.20% | 0 | 3.06% |
| 1956 | 8 | 1.00% | 0 | 3.36% |
| 1957 | 9 | -4.80% | 0 | 3.89% |
| 1958 | 10 | 2.80% | 0 | 3.79% |
| 1959 | 11 | -1.60% | 0 | 4.38% |
| 1960 | 12 | 4.80% | 0 | 4.41% |
| 1961 | 13 | 0.30% | 0 | 4.35% |
| 1962 | 14 | -2.20% | 0 | 4.33% |
| 1963 | 15 | -2.80% | 0 | 4.26% |
| 1964 | 16 | 1.50% | 0 | 4.40% |
| 1965 | 17 | -5.20% | 0 | 4.49% |
| 1966 | 18 | -3.50% | 0 | 5.13% |
| 1967 | 19 | -0.10% | 0 | 5.51% |
| 1968 | 20 | -0.20% | 0 | 6.18% |
| 1969 | 21 | -1.60% | 0 | 7.03% |
| 1970 | 22 | 0.50% | 0 | 8.04% |
| 1971 | 23 | -2.60% | 0 | 7.39% |
| 1972 | 24 | 0.80% | 0 | 7.21% |
| 1973 | 25 | -5.70% | 0 | 7.44% |
| 1974 | 26 | 1.70% | 0 | 8.57% |
| 1975 | 27 | 4.80% | 0 | 8.83% |
| 1976 | 28 | 1.60% | 0 | 8.43% |
| 1977 | 29 | -2.50% | 0 | 8.02% |
| 1978 | 30 | -0.20% | 0 | 8.73% |
| 1979 | 31 | -1.00% | 0 | 9.63% |
| 1980 | 32 | 8.00% | 0 | 11.94% |
| 1981 | 33 | 1.70% | 0 | 14.17% |
| 1982 | 34 | 8.40% | 0 | 13.79% |
| 1983 | 35 | 7.20% | 0 | 12.04% |
| 1984 | 36 | -5.60% | 1 | 12.71% |
| 1985 | 37 | -3.90% | 1 | 11.37% |
| 1986 | 38 | -2.50% | 1 | 9.02% |
| 1987 | 39 | -1.40% | 1 | 9.38% |
| 1988 | 40 | -7.60% | 1 | 9.71% |
| 1989 | 41 | -7.80% | 1 | 9.26% |
| 1990 | 42 | 7.70% | 1 | 9.32% |
| 1991 | 43 | -1.60% | 1 | 8.77% |
| 1992 | 44 | -0.70% | 1 | 8.14% |
| Avg 49-92 | | -0.05% | | |
| Avg 49-84 | | 0.4% | | |
| Avg 84-92 | | -2.6% | | |

Regression Output:

| | | |
|---|---|---|
| Constant | | -0.0157 |
| Std Err of Y Est | | 0.0375 |
| R Squared | | 0.1702 |
| No. of Observations | | 44 |
| Degrees of Freedom | | 41 |
| | Divestiture | Moody |
| X Coefficient(s) | -0.0440 | 0.3464 |
| Std Err of Coef. | 0.0155 | 0.1944 |
| t-statistic | -2.8330 | 1.7818 |
| F-statistic | 4.2036 | |
| df (2,41) | | |

Source: USTA Ex Parte, February 1, 1995, Christensen Affidavit

## Input Price Differential (Christensen Affidavit)




Source: USTA Ex Parte, February 1, 1995, Christensen Affidavit

STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

*Re: Price Cap Performance Review for Local Exchange Carriers*

Mr. Chairman, today's vote on a revised LEC price cap plan is perhaps the single most important common carrier policy decision this Commission will have made during your Chairmanship. Therefore, I feel I must first begin by expressing my profound appreciation to the staff in the Common Carrier Bureau who have worked so incredibly hard under the most difficult conditions to bring this matter to closure. In particular, I wish to say that the valuable contributions of Kathy Wallman and Richard Metzger have only reinforced the tremendous respect I already have for their intelligence, knowledge, and dedication. I am sure my fellow Commissioners all join me in thanking you for the tremendous effort it took to bring this item forward for our consideration today.

Now, a brief perspective on what we will do today, and what we will not. What we will do is adopt an interim plan that has two principal functions. Its first, and most immediate function, is to revise and restructure the Commission's original price cap plan to reflect the goals we feel are important today in any system of price regulation of local telephone companies. The interim price cap plan before us attempts to balance the competing interests of consumers, local and long distance carriers, for whatever interim period this plan will be in effect.

And that leads to the second, perhaps more important function, of this plan. This interim plan also provides a template for a permanent plan which, I hope, will be structured not simply to replicate the effects of competition, but also to encourage the growth of competition and to recognize its effects as it takes hold. For the twenty years I have served on this Commission we have repeatedly, in every regulatory area entrusted to us, stressed the preferability of competition to regulation as a means of enhancing consumer welfare. After twenty years of experience, I happen to believe it. And after several months of intensively grappling with this proceeding, I am more convinced than ever that any form of rate regulation, however sophisticated, however necessary, comes in a poor second to competition. For this reason, I will look forward to framing our permanent price cap plan in such a way that, by incenting competition, it can bring about its own demise.

Now, for my view of what we have not done today. We have not structured an interim plan that elevates any one policy goal - be it encouraging the deployment of advanced networks, or lowering access charges, or lowering consumer phone bills, or maximizing LEC efficiency - to a preeminent place over all the others. Rather, we have attempted to balance these differing policy objectives. For today, I am satisfied with the balance we strike. Is it perfect? No; few regulatory balancing acts or contentious items ever are. But is it fair and forward-looking? To this I answer yes; and on this basis I will vote to adopt it.

March 30, 1995

**SEPARATE STATEMENT**
**OF**
**COMMISSIONER ANDREW C. BARRETT**

RE: Price Cap Performance Review for Local Exchange Carriers; First Report and Order (CC Docket No. 94-1)

In this First Report and Order, the Commission adopts an interim price cap plan adjusting the current plan to allow local exchange carriers (LECs) to choose from among three "productivity factors" set at 4.0, 4.7 and 5.3 percent, which will serve as an offset to the inflation-based increase that LECs are permitted to make to their rates each year. LECs that choose either of the lower two productivity factor options will remain subject to "sharing" obligations that, as in the current plan, limit their ability to retain earnings in excess of specified rates of return. Those companies that elect the highest step, with a productivity of 5.3 percent, will incur no sharing obligation. Based on the respective sharing obligations, companies electing the 4.0 percent lower option will be limited to an effective rate of return of 12.75 percent; companies electing the 4.7 percent middle option will be limited to an effective rate of return of 14.25 percent. The interim plan also requires the companies to reinitialize, or recalculate their Price Cap Index downward on a one-time basis by up to 2.8 percent, or .7 percent for each of the past four years in which the LEC elected the 3.3 percent productivity factor under the current plan, which the Commission adopted in 1990.

I have supported a move beyond the current price cap mechanism for a considerable time, with a particular interest in facilitating movement toward a regulatory framework (or the elimination of) that will more realistically reflect the telecommunications industry's unique and rapidly changing structure, costs, and investment needs.[1] Any new price cap mechanism should be founded on two fundamental assumptions: (1) the individual LECs are less alike due to unique market developments and resulting strategies, and (2) the industry is dynamic, and therefore, should not be regulated by a static price cap mechanism that changes only through a full review by the Commission. At the same time, I am concerned that the regulatory mechanism must provide incentives for telephone companies to invest in more risky endeavors in the marketplace while requiring that these companies bear the burdens associated with the increased risks rather than subsidizing the new endeavors at the expense of customers who do not want such services.[2] I also have been convinced for some time that the complexity of our costing and other procedures, which are based in the current price cap mechanism, will not be able to cope with sweeping changes in technology and market structures.[3] Clearly, as more communications companies are transporting broadband and video along with existing voice services, and once

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[1] See "Beyond Price Caps: Escaping the Traditional Regulatory Framework", delivered by Commissioner Andrew C. Barrett to Florida Economic Club, August 27, 1992 ("Beyond Price Caps").

[2] See "Beyond Price Caps".

[3] See "Beyond Price Caps".

wireless services are used extensively for local access, the allocation of costs will have less meaning than it does today.

I vote in favor of this decision, notwithstanding certain public policy concerns, because of several important aspects of the interim price cap mechanism that will distance the Commission from the certain vestiges embodied in the current price cap mechanism, while also providing local exchange carriers with greater choices or flexibility than the current price cap mechanism. Most significantly, this interim price cap mechanism accommodates the industry's heterogeneity. Given the different results and performance by LECs under price caps between 1990 and 1994, a greater degree of choice is necessary for LECs that have demonstrated lower earnings in the past, as well as those companies generating comparatively high productivity rates that are now constrained by sharing requirements in the current price cap plan. With respect to the combinations of productivity factors and sharing mechanisms, the interim mechanism applies three options rather than the two options in the current price cap plan. I believe that three options may increase the choices available to LECs, minimizing the opportunity for skewed incentives or unintentionally forced choices by LECs that might occur as a result of maintaining only two choices. Furthermore, the greater number of options will help to reflect more accurately the stratified differences created by past choices and performances among LECs, as companies have demonstrated a variety of earnings, rates, and choices for productivity factors. Therefore, these productivity and sharing options will help to signal the form of a future price cap mechanism. To the extent that this interim decision leaves a number of issues unresolved, the increased opportunity for choice also may mitigate some of the resulting uncertainty, especially to the extent that the interim or transition period is extended.

This price cap mechanism also continues some (albeit too slow) movement away from rate-of-return regulation. Most significantly, this mechanism provides LECs with the opportunity to completely eliminate their sharing obligations. As a LEC reaches the 5.3% high productivity factor, its sharing obligation is totally eliminated. Accordingly, this plan may encourage companies to move from the lower to middle productivity factor, or from the middle productivity factor to the higher level, by providing an opportunity for a LEC to reduce or eliminate its sharing requirement if it is able to make efficiency or productivity gains. In this regard, it has been my objective to establish three sufficiently distinct and attainable options for productivity factor and sharing combinations so that companies will have a realistic incentive to move beyond the lower step into the middle and higher levels.

With respect to the practical impact of the adjustments to the price cap structure as a result of this interim mechanism, I believe it is important to highlight other elements of flexibility incorporated into this decision. First, it is important that the reinitialization applies to the price cap index, and thus does not necessarily require a reduction in rates by each LEC. For instance, companies that already have been pricing below their index and companies that previously selected the higher 4.3% productivity offset in the current mechanism will incur lesser one-time adjustments. This decision also extends the lower pricing bands that apply to the service categories within the traffic sensitive and trunking baskets by five percent to allow LECs additional downward pricing flexibility.

Furthermore, this decision reflects a step toward adopting a permanent measure of

industry productivity, such as a determination of Total Factor Productivity (TFP).[4] In taking this step, it is important to note that the record in this proceeding has been based on analyses of several thorough models for calculating productivity, including AT&T's "direct model."[5] To the extent that the arguments raised by various parties have demonstrated a wide range of views regarding the appropriate process for establishing data for productivity and earnings and identifying an analytically sound methodology for estimating productivity, the respective productivity models provided both an important basis for this interim mechanism and an opportunity to progress toward a mechanism with a more refined statistical or econometric foundation.

I also view this decision on the LEC price cap mechanism with several fundamental policy concerns that I hope the Commission will be able to address in the remaining aspects of this proceeding. Most fundamentally, I would have preferred that this decision provide a greater measure of certainty to the industry, the financial community, and consumers by establishing a permanent plan. The use of an interim price cap mechanism, by definition, could exacerbate the uncertainty surrounding LEC operations and investment. The "interim" mechanism also could become, in effect, a permanent or long term mechanism by virtue of the duration of the interim or transition period. Even if the Commission is able to resolve the remaining issues in this proceeding, this interim mechanism will have a significant public policy role in determining the permanent mechanism. Therefore, I am especially concerned about the manner in which the limits in establishing this interim mechanism will necessarily influence the Commission's decisions in the future.

The Commission's January 1994 Notice of Proposed Rulemaking sought comment on a number of "baseline" issues regarding current levels of access rates based on the structure of the current price cap mechanism. The Notice also raised broad or "transitional" issues regarding the treatment of various services as they become subject to increased levels of competition. It is my opinion, however, that the focus by many parties in this proceeding unfortunately has been limited to specific baseline issues of determining a productivity factor, the sharing requirements, and a "reinitialization" of rates, and has contributed to restricting the opportunity to address the complete price cap mechanism.

Presently, I do not believe that we are at a point where the public can totally rely on market forces to set prices for all services, especially with respect to services provided to residential areas. I do believe that rapid changes in the local exchange marketplace will underscore the importance of transitioning toward a streamlined regulatory structure where sources of competition are evident in the local marketplace. Thus, I would have preferred to begin or, at a minimum, prepare for the transition, where possible for specific services by: (1) reducing the Commission's link between prices and earnings on a rate base, and (2) allowing more pricing flexibility based on a correlation to cost in markets where competition has

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[4] Comments of United States Telephone Association, CC Docket No. 94-1.

[5] See, e.g., Comments filed in CC Docket No. 94-1 by AT&T, Ad Hoc Telecommunications Users Committee, and MCI.

developed.[6] Nonetheless, it remains imperative to develop specific criteria for identifying competition for particular services, despite certain comments in this proceeding,[7] as well as to establish thresholds that might trigger the transitional regulatory mechanisms. Therefore, I am troubled that it remains necessary to devote significant attention to developing a streamlined approach to the baskets and bands in the current price cap mechanism in a manner that will allow specific services to be removed as they become subject to competition, without initiating a full review of the entire price cap mechanism.

In the context of continuing this broad review of the price cap mechanism, I also observe that today's decision raises the need to review access charges more completely, especially to the extent that these funds are a basis for subsidizing universal service. Thus as access charges decline, the Commission must review the policy goals and means of promoting universal service in general terms, rather than a more narrow review of high cost assistance to LECs.

Additionally, I would have preferred to establish generally lower levels for the productivity factors in this interim price cap mechanism. With respect to the 4.0% lower productivity factor, I am concerned that certain companies that have demonstrated lower productivity in the past, and therefore lower earnings, especially smaller LECs or companies that will consider whether to elect to operate under price caps, may not sustain this level of productivity. Likewise, it is also conceivable that companies facing greater levels of competition may find it more difficult to sustain even this lower level of productivity. In order to address these instances, this decision's provision for greater downward pricing flexibility in the traffic sensitive and trunking baskets may provide a measure of relief, and it is necessary, therefore, to resolve the remaining transitional issues with respect to further elements of pricing flexibility. Regarding the 5.3% higher level of productivity, I also am interested in whether we have provided a realistic incentive for companies to move to this option in order to attain the benefits derived from eliminating sharing, especially to the extent that companies may question the likelihood of sustaining this level of productivity.

Finally, this proceeding has involved extremely complex analytical work and public policy decisions, and I acknowledge the outstanding dedication shown by our Commission staff, my colleagues, and their respective staffs.

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[6] See, e.g., Comments of GTE.

[7] See, e.g., NYNEX Comments on USTA Proposal; see also NYNEX ex parte statement, March 3, 1995.

March 30, 1995

DISSENTING STATEMENT
OF
COMMISSIONER SUSAN NESS

RE: *Price Cap Performance Review for Local Exchange Carriers (CC Docket No. 94-1)*

I regretfully but resolutely dissent. In my judgment, the ruling adopted today underestimates the ability of local telephone companies to increase the efficiency of their operations and shortchanges the interests of consumers.

Four years ago, when price cap regulation for local telephone companies was initiated, the Commission's stated objective was that "[i]ncentive regulation will reward companies that become more productive and efficient, while ensuring that productivity and efficiency gains are shared with ratepayers." The Commission committed to a comprehensive review during the fourth year of the price cap regime and to make any necessary adjustments.

The promised review has been underway for more than a year. Today's ruling is the interim – and, in my view, less than satisfactory – result of our efforts.

Introduction. To review and revise our price cap rules presents us with formidable challenges. Even if we confine one stage of the effort to certain interim adjustments, the task of establishing new productivity factors and sharing rules requires us to evaluate complex evidence that is subject to conflicting interpretations. Each of us must make independent judgments on the record as we understand it.

My own conclusion is that today's ruling materially underestimates the productivity gains that can reasonably be expected of the large telephone companies. This miscalculation will lead directly to interexchange carriers paying more than they should for interstate access services, and indirectly to similarly adverse impacts on consumers. As a result, the Commission's ruling sends the wrong message to the local and long distance carriers, to the state regulators with whom we share responsibility for oversight of the telephone companies, and to the American public.

Today the Commission acknowledges that the productivity factors prescribed in 1990 were significantly and erroneously low. Through the "reinitialization" of price cap indices we ensure that this error – to the extent it is now being corrected – will not be compounded in future years. Yet, even with this experience, the Commission adopts overly modest productivity goals for the coming year or two, thereby setting the stage for future overearnings and future reinitializations.

Overlaid on these problems are the drawbacks of the Commission's decision to restructure the sharing options. Although the interim plan is intended simply as a short-term measure pending completion of the current rulemaking, the Commission now concludes that price cap companies should have three X-Factor options rather than two.

The consequence of these features of our interim plan is to reduce consumer benefits, increase uncertainty in the marketplace, and add unnecessary complexity to the framework. A far better approach would have been to change the structure less and the numbers more.

Unnecessary Complexity. I disagree with the decision to replace the present two-option model with a three-option model during this stage of the rulemaking. The drawbacks of this approach have not been adequately considered. A three-option model adds needless complexity and "churn," particularly in light of the brief expected life of this interim plan and the inability of any Commissioner to know, at this juncture, how many options will be included in the long-term structure to be formulated in the next phase of this proceeding.

In light of the potential disruption, I do not regard it as prudent to adopt such a significant change in the structure of the price cap regime at a time when we are not yet ready to settle upon a long-term plan. And I fear that the untested economic logic of a three-option model may impel carriers to hold back from reaching for the high option, the only one that eliminates the vestiges of rate-of-return regulation. To the extent we discourage carriers from pursuing the no-sharing option, we have lost an opportunity to move away from reliance on cost-accounting strictures and other trappings of traditional common carrier regulation.

Inadequate Productivity Expectations. More troublesome than the number of options are the specific X-Factors associated with the options, especially the low-option X.[1] The new productivity factors are more aggressive than those in the current plan, but insufficiently so. Considerably greater productivity gains are readily attainable, particularly in light of the pace at which telecommunications technologies are advancing.

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[1] The order establishes three options: a low option now fixed at 4.0 percent, a middle option of 4.7 percent, and a high option of 5.3 percent. The low option is subject to sharing bands which enable telephone companies choosing a relatively meager productivity target to earn, ultimately, up to 12.75 percent (1.5 percentage points above their authorized rate of return). It also enables them to be compensated for any shortfall below 10.25 percent. Under the middle option, carriers which assume the modest productivity challenge of a 4.7 percent X-Factor are subject to sharing bands which enable them to retain 50 percent of earnings up to 16.25 percent, while still being shielded against profitability shortfalls to the extent earnings fall below 10.25 percent. The high option permits carriers which assume a 5.3 percent productivity challenge to retain whatever earnings they can generate – and provides no cushion for earnings that are below expectations.

Indeed, the record contains substantial evidence that the productivity gains of local exchange carriers in the post-divestiture, pre-price cap era were above the lower X-Factor we are prescribing today.

The Commission's own Frentrup-Uretsky study (now corrected to exclude the aberrational 1984 data point) demonstrates that industry-wide productivity improved at a rate of 5.0 percent per annum over the years from 1985 to 1990. In other words, our own study of post-divestiture, pre-price cap performance demonstrates powerful trends toward increased productivity.

The USTA study is consistent with this finding. If corrected to account for differences in input prices, the USTA study presents highly consistent results – 4.8 percent – over a comparable time frame. Moreover, two of the most experienced state public service commissions, those in New York and in California, have approved or are considering price cap plans with productivity expectations in the 4.6-5.0 percent range.

These numbers are testimony to the prowess of our telecommunications industry and the powerful forces at work in cutting-edge technologies. The phenomenon known as Moore's Law ensures that the cost of computer processing power is halved every 18-24 months. The ever-increasing capabilities and ever-decreasing prices of switches and lasers and a wide array of other equipment provides a solid foundation for continued productivity growth throughout the communications and information industries.

One can, of course, evaluate the numbers in ways that support different conclusions. For example, in its 1990 decision, the Commission averaged the Frentrup-Uretsky study with a longer-term study, the Commission's Spavins-Lande study (1930-1989), which reflected much lower productivity gains.[2] We now acknowledge, however, the need to revise the Frentrup-Uretsky study, so even the methodology employed in 1990 would compel a new X-Factor and reinitialization requirement that is higher than is being adopted today .[3]

An only slightly more probing reevaluation of the 1990 decision would justify a more substantial increase in the new low-option X-Factor. In my judgment, the Spavins-Lande study is not entitled to comparable consideration with the far more recent and relevant experience covered in the Frentrup-Uretsky study, so any departures from a 4.1 percent low-

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[2] This average was the foundation for the 2.8 percent productivity factor, which when supplemented by a 0.5 percent "consumer productivity dividend" was the basis for the 3.3 percent low-option X-Factor in the price cap rules over the past four years.

[3] The arithmetic average of these two studies, plus the existing 0.5 percent consumer productivity dividend, equals 4.05, or approximately 4.1, percent. This, in turn, justifies a one-time reinitialization of 3.0 or 3.2 percent. The order shaves these numbers downward to a modest degree to reach a predetermined result. These flaws alone have the potential to inflate interstate access prices by $110 million in the first, and I hope only, year of the interim plan.

end X-Factor and a 3.2 percent reinitialization must logically be in an upward direction.[4] Indeed, post-price cap studies – using a variety of methodologies – confirm that productivity gains have continued at significantly more than a 4.1 percent rate.

The Commission has previously said that price cap regulation is intended to create added incentives for productivity gains and to ensure that ratepayers share in the resulting benefits. Such objectives cannot be reconciled with the adoption of X-Factors which are based on expectations that the telephone companies' productivity gains under price caps will be lower than they were under rate-of-return regulation.[5]

Nor can the 4.0 percent option be justified by the need to accommodate those companies whose capacity for productivity gains is significantly below the average. For such companies, there is an even lower rung on the ladder: the lower-formula adjustment mechanism.

There are a variety of reasons why certain companies may be unable to match their peers in productivity gains. For example, geography, competition, plant vintages, and quality of management are all real factors that may come into play. Whatever these limitations, our lower-formula adjustment mechanism ensures that these carriers are protected; within specified limits, the price cap index in each year can be increased to offset any earnings shortfall occurring in the preceding year.[6] Thus, the modest low-option X-Factor adopted today cannot be defended in terms of concern for the lesser performers among the telephone companies.

We must not forget that our telephone companies are preparing to lead the world in the delivery of innovative, sophisticated, cost-effective communications and information services. I am fully confident that they are up to the challenges they will face, including the need to continue to increase productivity and efficiency at a pace greater than is contemplated by the interim plan adopted today.

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[4] For example, a two-third/one-third weighting of the two studies would generate a productivity factor above 4.0 percent. Addition of a 0.5 percent consumer productivity dividend would justify a low-option X-Factor of 4.5 percent and a reinitialization of 4.8 percent.

[5] Rate-of-return regulation focuses incentive away from efficiency. If the telephone companies were able to achieve productivity gains on the order of five percent per year in the pre-price cap environment, it is anomalous in the extreme for the Commission now to peg the low-end expectations at 4.0 percent, at least in the absence of credible evidence that the carriers' ability to achieve productivity gains is diminishing.

[6] Some of these factors are within the carriers' control; others are not. Our lower-formula adjustment mechanism is not designed to distinguish on this basis.

Long-Range Objectives. As a matter of context, it is important to emphasize that today's decision is not intended to establish the plan for the next four years of price caps; it is merely an interim plan while we develop a more comprehensive record on certain issues that we have not yet had an opportunity to resolve. Disappointed as I am with the interim plan, I am ready to turn to a discussion of longer-term issues.

As we prepare for the next phase of this proceeding, two issues will be of special importance to me: elimination of sharing and promotion of competition.

I am determined to explore avenues that will enable us to eliminate the "sharing" aspects of price caps. Sharing perpetuates many of the less desirable features of rate-of-return regulation. Eliminating sharing is also a precondition for taking services out from under price cap regulation, as we have done for AT&T when competitive considerations warranted. I firmly believe that we can structure a regime which enables those companies which are willing to step up to the increased risk of a higher X-Factor to enjoy the rewards of keeping whatever profits they can generate.

On the other hand, if we fail to establish the right X-Factors, we cannot responsibly eliminate sharing. Certainly, given the highly cautious manner in which the original X-Factors were established, it is fortunate that the original plan included provisions for sharing.

Regarding competition, the Commission has now decided to modify our price cap goals so as to promote, and not only replicate the effects of, competition in interstate access and other local communications services. I firmly support this decision. Whenever and wherever possible, I am committed to replacing regulation with competition. At the same time, I recognize that introducing competition where it currently is lacking cannot be achieved by wishful thinking.

Conclusion. As we continue our efforts, we have a responsibility to manage the transition carefully. We must avoid overregulation. Equally important, we must not abdicate our responsibilities while there remain significant problems of market power.

I know that we will confront many difficult issues as we move to the next step of the process. I look forward to the debate.

March 30, 1995

# SEPARATE STATEMENT OF

# COMMISSIONER RACHELLE B. CHONG

*Re: Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1*

By this First Report and Order, the Commission makes important modifications to its scheme of price cap regulation for local exchange carriers ("LECs"). These changes are made after four years of experience with LEC performance under the Commission's initial price cap regime. The revised interim plan adopted in this decision contains significant improvements that, in my judgment, should more fully serve the public interest goals underlying price caps. I write separately to express my strong support for this item, and to touch on a few of the modifications and their relationship to our goals.

First, a price cap scheme of regulation should ensure rates that are just, reasonable and not unduly discriminatory. In this decision, we further this fundamental goal by reassessing our calculations regarding LEC productivity that served as the basis for setting the initial rates under price caps in 1990. Specifically, we revisit our 1990 decision to include in our calculations access price data for the 1984-1985 tariff year. This specific data emerged from the most tumultuous year in the history of American telecommunications, when AT&T – the largest corporation the world has known – was dramatically restructured. The so-called "1984 data point" varied significantly from data relating to the other years considered in the study. Inclusion of the 1984 data point had a substantial downward impact on the Freentrup-Uretsky study's overall measure of LEC productivity. This study, in turn, resulted in the selection in 1990 of a lower annual productivity offset – or so-called "X-Factor" – for the LECs.

Record evidence submitted in this docket now calls into question the Commission's original judgment in 1990 to include the 1984 data point in its initial productivity calculations. Indeed, this new evidence – aided by the acuity of hindsight – now persuades us that the Commission erred by considering this data back in 1990. We correct this error in this decision for an important policy reason. By correcting our error on a prospective basis, we ensure that future rates are not impacted by what we can now see is an anomalous 1984 data point. This correction involves two changes: (1) an upward adjustment to relevant X-Factors; and (2) a one-time downward adjustment to the LECs' price cap indices. These corrections should more effectively ensure just and reasonable rates for consumers in the future.

Second, to the extent possible, our price cap rules should sever the link between prices and traditional notions of rate-of-return regulation. Some parties have criticized the Commission's initial price cap regime for LECs because it employs two "backstop" mechanisms – the sharing and low-end adjustments – which potentially are triggered by an individual LEC's reported rate-of-return. Under the sharing mechanism, reported earnings that exceed certain thresholds established by our rules must be returned, in whole or in part, to consumers. Conversely, earnings that fall below a certain threshold entitle a LEC to increase rates through the low-end adjustment mechanism. LECs argue strenuously that grafting rate-of-return mechanisms such as these onto our price cap regime blunts the profit incentives that animate a price cap world.

During this proceeding, I have challenged the notion that sharing must continue to play a role in the scheme adopted in this decision. My belief is that sharing can work at cross-purposes to the profit incentives underlying price caps. In this proceeding, I heard from the staff and many parties – including some LECs – that sharing is a necessary, if unwelcome, component of any price cap scheme involving multiple X-Factor options. The evidence supports multiple X-Factor options, given the wide divergence of LEC performance under price caps. Absent sharing on the low or middle X-Factor options, I was told, a LEC would have no incentive to elect a more challenging X-Factor – even if the higher X-Factor was legitimately within the LEC's reach. Over time, I was persuaded by this argument and concluded that it is not feasible at this point to do away with sharing completely. I therefore have come reluctantly to accept the need to retain sharing and the low-end adjustment in the interim plan. I want to be clear, however, about my long-term goal for price cap regulation – my preference is to sound the death knell for sharing, and for other vestiges of rate-of-return regulation.

With this decision, I am pleased that the Commission takes a step – albeit a cautious one – away from the prior plan's reliance on rate-of-return backstops. I recognize that this interim plan, in some respects, contains elements of rate-of-return regulation, primarily sharing, in two of the X-Factor options. I find it significant that in this interim plan the LECs will have the option, for the first time, to elect a higher annual X-Factor that does not contain these rate-of-return mechanisms. I believe this is in the public interest because the prospect of higher earnings should act as an incentive to LECs to select the most challenging X-Factor and to strive to increase efficiency. Meanwhile, consumers will benefit by the resulting reductions in access charges.

Third, our price cap scheme should encourage LEC productivity to the maximum extent possible, while recognizing that individual LECs face different competitive and economic circumstances that affect their ability to achieve a single industry-wide productivity target. To this end, we have modified the current two-option X-Factor approach by adding another X-Factor option between the lowest and highest productivity offsets. The options of the interim plan offer gradations of sharing: fairly strict sharing at the lowest option, more lenient sharing in the middle, and no sharing associated with the

highest X-Factor. Carriers now have additional choices and the incentive to self-select the X-Factor that most closely resembles their ability to achieve productivity gains.

The prospect of being able to retain higher earnings by selecting a more challenging X-Factor offers strong incentives for carriers to move up the X-Factor continuum. Again, the selection of higher X-Factors should offer consumers benefits in the form of lower access charges. Those carriers that cannot meet more challenging X-Factors, due to short run competitive circumstances, regional economic pressures or other reasons, may find it necessary to select the lowest X-Factor. Presumably, carriers in such circumstances will not achieve high earnings and thus will incur little if any sharing obligation. Carriers that believe they can accept the most challenging productivity offset should select the highest X-Factor. And carriers somewhere in the middle of these outer productivity boundaries have yet another option. In short, the plan recognizes that LECs are heterogeneous in terms of productivity, and offers more choices to carriers to reflect that diversity. This approach is consistent with one of my basic regulatory tenets: to craft flexible regulations that are adaptable to differing and changing circumstances.

In addition to adopting an interim plan in this decision, we will soon be issuing a further notice of proposed rulemaking in this docket to consider transitional and long-term issues regarding our LEC price cap regime. I urge that we carefully consider what our regulatory regime should look like at the end of the millennium and into the twenty-first century. We must develop a forward-looking blueprint to guide the transition from price cap regulation to more flexible, streamlined regulation as competition evolves in the provision of interstate access services.

The emergence of competition, and its implications for regulation, should be a central focus of this further proceeding. As competition begins to take hold in a particular geographic or service market, our rules should provide increased flexibility to the LECs to compete fairly for interstate access business. While price cap regulation is designed, to the extent possible, to replicate a competitive marketplace, any form of regulation is an imperfect surrogate for full-fledged competition. Where it can be shown that a particular market is fully competitive, our regulation should give way to competitive market forces to ensure that rates are just, reasonable, and not unduly discriminatory. To achieve this goal, we must develop workable, objective criteria to measure the extent of effective competition. This is a difficult challenge, but one I believe we can meet with the help of the parties. We simply need to get on with it.

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